

2000 to January 2001 – we had new rules in place. Many of the initiatives cited by the associations may have been responsive to those requirements. We cannot be certain what would occur if we announced that we would not be adopting new rules. Moreover, most of the activities cited by NAB and StBAs were the result of association efforts.” There is little evidence in the record as to the activities engaged in by licensees generally. Although we agree that broad outreach **is** in the long-term best interest of the broadcast industry, it has become apparent based on the record in this proceeding, that self-interest alone is not enough.” We cannot be confident that individual licensees – who are the focus of our regulations – would engage in outreach efforts in the absence of a rule. Indeed, the American Federation of Television and Radio Artists (“AFTRA”), a national labor organization with membership in the broadcast industry, states that its members have reported that broadcasters and MVPDs have reduced their participation in job fairs and other outreach and recruitment efforts since 1998.¹¹⁴

60. Some broadcasters support the adoption of an EEO rule. Radio One, Inc. (“Radio One”), which is minority controlled, owns or operates 65 radio stations and is the nation's seventh largest radio broadcasting company. Radio One contends that the EEO Rule is especially necessary in view of the recent consolidation in the broadcast industry. It argues that group owners are seeking to achieve economies of scale by “clustering” multiple stations in local markets. **As** a result of more centralized operations, it says, the number of quality broadcasting jobs, particularly top management positions, has diminished. Radio One argues that this places pressure on minorities and women in competing for fewer jobs in the marketplace where they are already underrepresented, particularly at the top level.” The EEO Rule also **was** supported by Inner City Broadcasting Corporation (ICBC), the second largest Black owned and operated radio company in America.¹¹⁶ Charles Warfield, President and Chief Operating Officer of subsidiary ICBC Broadcast Holdings, Inc., cited from his own experience in attending a 1997 meeting of corporate executives and general managers of a 96-station group. Only six of the attendees were Black, and of them, only three are still employed in the broadcast industry; a reduction which he attributed to consolidation in the industry.”

61. Our proposed EEO requirements also are generally supported by the MVPD industry. The National Cable & Telecommunications Association (“NCTA”), the principal trade association of the cable industry, generally supports the proposed EEO regulations applicable to MVPDs, which are comparable to those applicable to broadcasting. NCTA states that EEO is “the fair policy for our employees and the right policy for our industry.”¹¹⁸ NCTA also states that there is a need for the EEO

¹¹² Furthermore, the Associations' efforts have not been universal: we can assume, for example, that if 29 State Associations (except for North Carolina, which is not included in StBAs' comments) participated in job fairs, the others did *not*.

¹¹³ June 24, 2002 EEO *En Banc* Hearing, Tr. 71-72.

¹¹⁴ AFTRA Comments ¶ 19; statement of Gregory Hessinger, AFTRA National Executive Director, June 24, 2002 CEO *En Banc* Hearing at Tr. 37. See also NAB Reply Comments at 17 (NAB criticizes AFTRA's contention as lacking specificity).

¹¹⁵ Radio One Comments at 5-6.; statement of Catherine L. Hughes, Founder and Chairperson of Radio One, June 24, 2002 EEO *En Banc* Hearing at Tr. 77 *et seq.*

¹¹⁶ June 24, 2002 EEO *En Banc* Hearing at Tr. 98 *et seq.*

¹¹⁷ June 24, 2002 EEO *En Banc* Hearing at Tr. 100-101.

¹¹⁸ NCTA Comments at 1.

rules because there “must be no doubt that cable systems” reach out to all sectors of their communities in recruiting new employees so as to ensure that all qualified applicants have an opportunity to apply for and be considered as job candidates.” NCTA further emphasizes that it supports the requirement to recruit for all vacancies so companies will offer all prospective employees an equal opportunity to be considered for jobs.¹²⁰ It further supports the requirement to recruit widely enough so no segment of the community is left out.¹²¹

62. Discrimination may be easy to hide and difficult to prove.” Allegations of discrimination may never be fully litigated because a violator will elect to settle any litigation before it reaches the stage of a final judgment.” It is thus impossible to quantify reliably the extent of actual discrimination that exists today.

63. Several commenters cite a 2001 study by the Radio-Television News Directors’ Association (“RTNDA”) and Ball State University that, they contend, shows that minorities and females still face difficulties in obtaining broadcast employment, especially in accessing higher level positions.¹²⁴ According to the RTNDA study, women comprise 39.7 percent of the television work force and 37.4 of the radio work force, and minorities represent 24.6 percent of the television and 10.7 percent of the radio work force. Nonetheless, only 20.2 percent of television news directors are women and only eight percent are minorities. Further, only 21 percent of radio news directors are women while only 4.4 percent are minorities. The RTNDA study also reflects that 91.3 percent of television station general managers are White (8.7 percent minority) while 67.4 percent are male (12.6 percent female). In radio, 94.3 percent of general managers are White (5.7 percent minority) and 67.7 percent are male (12.3 percent female).

64. StBAs cite the RTNDA report for the proposition that minorities held almost a quarter of all jobs in television news and that the number of minorities in radio news had increased. StBAs compares this with newspaper journalists, of whom only 12.1 percent are minorities. StBAs does not otherwise address data concerning minority and female employment, stating that to establish a target level of representation for any group would amount to a quota system that would unlawfully deny equal protection.¹²³

¹¹⁹ NCTA Comments at 3

¹²⁰ NCTA Comments at 4

¹²¹ NCTA Comments at 5, 9

¹²² See MMTC Comments at 42-47.

¹²³ As an example, EEOC reported that, from 1997 to 2001, it filed 1,963 lawsuits alleging discrimination, of which 1,723 were resolved. Of resolutions, 57.73 percent were by consent decree, 27.5 percent were by settlement agreement, and 2.13 percent were by voluntary dismissal. Only 12.69 percent were resolved by court order. EEOC, “A Study of the Litigation Program Fiscal Years 1997-2001,” released August 13, 2002, at ¶ B.2, B.3, and B.7. See <http://www.eeoc.gov/litigation/study/study.htm>.

¹²⁴ AWRP Comments at 3 and Appendix A

¹²⁵ StBAs Reply Comments at 13-14.

65. On July 15, 2002, RTNDA released its study of the industry for 2002.¹²⁶ The 2002 data reflects that minorities hold 20.6 percent of the jobs in television news (19 percent in English language news rooms), down from 24.6 percent in 2001. The percentage of minorities in radio news was right percent, down from 10.7 percent in 2001. The percentage of minority news directors rose from 2001 to 9.2 percent in television and 5.1 percent in radio. Minorities held 5.2 percent of general manager jobs in television (down from 8.7 percent in 2001) and 3.8 percent in radio (down from 5.7 percent in 2001). In 2001, women comprised 38.6 percent of the television news workforce (down from 39.7 percent in 2002) and 32.5 percent of the radio news workforce (down from 37.4 percent in 2001). The percentage of women news directors increased to 25.9 percent in television (up from 20.2 percent in 2001) and 22.3 percent in radio (up from 21.9 percent in 2001). Women held 13 percent of general manager jobs in television and 11 percent in radio.

66. The relevance of this data does not derive from any intent to require that the workforce presence of minorities and females match that of the presence of those groups in the population, as suggested by StBAs, or to create any preference for any group over any other. The data are nonetheless relevant to demonstrate the continuing need for broad outreach and recruitment efforts.

67. Many of the opponents of our EEO program cite language from the *Report and Order* that “[o]utreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce **does** not simply replicate itself through an insular recruitment and hiring process.”¹²⁷ These parties contend that the broadcast workforce is not homogeneous and that it does not employ insular recruitment and hiring practices to replicate itself.¹²⁸ The cited language was intended to explain why outreach in recruitment as well as a ban on discrimination is necessary to deter discrimination. We did not intend to suggest that ever; broadcast station has a homogeneous workforce. We recognize that in many significant respects the industry has become more diverse over the past decades. We attribute this in large measure to the fact that the industry has been subject to our various EEO requirements since 1969. As noted, StBAs adverts to the fact that, according to the RTNDA studies, the broadcast media have achieved a greater degree of diversity than the print media – which have not been subject to EEO outreach requirements. Just because a particular station has minority employees, however, does not mean that all job applicants irrespective of their backgrounds will hear of job openings. Stations cannot rely on their employees to disseminate Job information widely. While the discriminatory impact of insular recruitment practices, such as word of mouth recruitment, is potentially worse if the work force is homogeneous, all stations need to openly recruit to ensure equal opportunity and access to jobs. The purpose of our rules is to ensure equal opportunity and nondiscrimination for all prospective applicants, not to achieve the proportional representation of particular groups.

68. With respect to insular recruitment practices by broadcasters, StBAs asserts that:

[t]here is also no evidence that word-of-mouth recruitment (*done in conjunction with other recruitment steps* such as use of the Internet job banks, over-the-air advertising, Job fairs, etc.) is more extensive than in other industries, much less that it is an inherently

¹²⁶ <http://www.rtna.org/research/womin.shtml>. A copy of this document has also been placed in the record in this proceeding.

¹²⁷ *Report and Order*, ¶ 3, 15 FCC Rcd at 2331; *Second NPRM*, ¶ 15, 16 FCC Rcd at 22847.

¹²⁸ See, e.g., Comments of StBAs and The Local Television Group.

discriminatory practice or has led to discriminatory practices by broadcasters in general.¹²⁹

We agree with StBAs that word-of-mouth recruitment is not inherently objectionable when combined with broad outreach. As will be explained below, it is not our intention to prohibit the use of word-of-mouth recruitment when used in conjunction with other public recruitment sources. Our purpose is to ensure that word-of-mouth recruitment practices are not the sole method of recruitment and that all members of the public have an opportunity to compete for available jobs.

69. We accordingly conclude that adoption of new outreach rules for broadcast and MVPDs is supported by the record in this case. The evidence in this proceeding demonstrates an ongoing need to deter discrimination and ensure equal employment opportunity in the broadcasting and MVPD industries. Moreover, Congress has made clear its intention that we should enact EEO rules for the broadcast and MVPD industries.

70. Finally, as noted above, our primary goal in adopting EEO program requirements is to ensure broad outreach in recruitment for broadcast and MVPD employment vacancies. We seek to do so in a manner that affords some flexibility to affected industries. The regulations we are adopting today provide sufficient flexibility. Entities will have broad discretion as to the type of recruitment sources they will use, the number of recruitment sources they will use, and the Prong 3 menu options they will implement. We are also providing that entities in smaller markets may implement fewer menu options than those in larger markets.

ii. EEO Program and Related Provisions

71. In the *Second NPRM*, we proposed a three-prong EEO program requirement designed to ensure equal opportunity to all potential applicants, including all races and both genders, without infringing on the rights of any group. The rules were further designed to be flexible enough to avoid imposing an undue burden and to apply reasonably and effectively to broadcasters and MVPDs in differing circumstances.¹³⁰ Based on our review of the comments, reply comments and other presentations filed in this proceeding, we adopt the proposed program, with some modifications.

72. **Outreach Prong 1 – Recruitment for All Full-time Vacancies.** We will adopt the requirement that broadcasters recruit for all full-time vacancies, except in exigent circumstances. Recruitment for substantially all vacancies using sources designed to achieve broad outreach is necessary to ensure that all segments of the population have an equal opportunity to compete for broadcast (and MVPD) employment and that no segment is subjected to intentional or unintentional discrimination. As discussed above, Congress clearly intended broadcasters to be subject to outreach requirements and our rule is consistent with that intent.

73. NAB challenges the necessity of requiring broadcasters to recruit for all vacancies. NAB's argument initially relies upon the contention that efforts by the broadcast industry to reach out to potential applicants and the effectiveness of our EEO regulations over the past more than 30 years have enabled minorities and women to obtain jobs in broadcasting so that minorities and women will learn of available jobs without the need for broad recruitment. NAB also asserts that broadcasters need the

¹²⁹ StBAs Comments at 31-32 (emphasis added)

¹³⁰ *Second NPRM* ¶ 15, 16 FCC Rcd at 22847

discretion to design recruitment tactics appropriate to particular positions. Next, NAB asserts that the present poor economy has reduced the availability of broadcast jobs so that recruitment for every vacancy is futile."¹³¹

74. We do not agree with these contentions. The effectiveness of our requirements in the past does not justify eliminating them now. Nor can we justify such a conclusion based on recent outreach efforts by the broadcast industry, however commendable, given that this has been an area under high scrutiny for some time. We can draw no inference from these facts; therefore, regarding the likely behavior of licensees in the absence of any current or proposed EEO program. Second, our requirements provide sufficient flexibility to design recruitment programs appropriate for different positions and circumstances, as will be discussed below. Finally, the present state of the economy does not justify dispensing with recruitment when jobs become available.

75. As an alternative to the requirement that broadcasters recruit for every vacancy, NAB proposes a rule whereby broadcasters would certify every four years that they have complied with one of three alternatives."¹³² First, NAB suggests that compliance with Office of Federal Contract Compliance Programs ("OFCCP") requirements should suffice as compliance with the Commission's Rule. As a second alternative, NAB proposes that broadcasters could achieve compliance by participating in a Broadcast Career Program operated by their state broadcast association. This refers to the model plan developed by the National Alliance of State Broadcast Associations ("NASBA") (referred to in the *Report and Order* as BEDA), which is attached to StBAs comments."¹³³ The third alternative proposed by NAB is a flexible outreach program developed by the licensee. The proposal would allow broadcasters to choose from a "menu" of eight general (*i.e.*, not related to a specific job vacancy) and eight specific outreach efforts. The general outreach efforts would include sponsorship of, or participation in, job fairs, scholarship, mentoring and intern programs, training programs for existing employees, and industry-wide training programs designed to train minority students for media careers. The specific outreach efforts would include standard recruitment methods (such as placing newspaper or magazine advertisements, making on-air job announcements, etc.) and such methods as posting job notices on Internet web pages. Under NAB's proposal, a licensee would achieve compliance by using two general outreach initiatives, or one general and two specific outreach initiatives, or four specific outreach initiatives.

76. We explained in the *Report and Order* why reliance on OFCCP requirements as a component of our EEO Rule would be inappropriate.¹³⁴ OFCCP regulations place a general nondiscrimination requirement on entities with federal contracts in excess of \$10,000.¹³⁵ The regulations require an "affirmative action compliance plan" for employers who have 50 or more employees and federal contracts of \$50,000 or more.¹³⁶ Enforcement of the plans is based primarily on compliance

¹³¹ NAB Comments at 11-14.

¹³² NAB submitted a similar proposal in response to the 1998 NPRM; however, its plan at that time contemplated compliance every two years, rather than the four years in its current proposal. *Report and Order*, ¶ 81, 15 FCC Rcd at 2366.

¹³³ StBAs Comments, Exhibit A. NAB also references an alternative plan submitted by StBAs, which we will address below.

¹³⁴ *Report and Order*, ¶ 133, 15 FCC Rcd at 2383.

¹³⁵ See 41 C.F.R. §§ 60-1.4 and 60-1.5.

¹³⁶ See 41 C.F.R. § 60-1.40 and Part 60-2.

evaluations that may occur at the discretion of OFCCP.'" It would be confusing to the public to have a separate agency with separate requirements and enforcement mechanisms responsible for the EEO outreach efforts of some broadcasters. Moreover, adoption of this proposal would greatly complicate enforcement of our rules by making it necessary for us to consider complaints based on alleged violations of the requirements of another agency, or to deal with situations in which a broadcaster that has claimed exemption based on OFCCP compliance is later found by OFCCP not to be in compliance with its requirements. A broadcaster may, of course, claim credit for steps taken to comply with OFCCP requirements if they also serve to establish compliance with our EEO Rule. OFCCP compliance, however, does not necessarily establish EEO compliance for our purposes.

77 We also found NAB's proposal to base compliance on the NASBA (BEDA) model program inadequate.¹³⁷ The NASBA model plan consists of a series of suggestions that individual state broadcast associations can use to develop programs for their states. However, individual associations are not required to follow the suggestions in the plan. Thus, the actual components of particular state association plans will vary. As we previously concluded, the existence of different requirements in different states would be confusing to the public and difficult to enforce. There also is no assurance that plans adopted by each state association will achieve our EEO goals. Moreover, we are concerned that some state associations could incorporate into their plans requirements that would be inconsistent with the Court's rulings in *Lutheran Church and/or Association*. For us to incorporate such requirements by reference into our own EEO requirements could raise legal or constitutional questions.

78. NAB's third option, its own plan, requires only lion-vacancy-specific general outreach initiatives (comparable to our Prong 3 menu options) without recruiting for a single vacancy. Although general outreach initiatives have value, we do not agree that they can serve as an adequate substitute for vacancy-specific recruitment. Indeed, the general outreach initiatives in Prong 3 are designed to alert interested persons to employment opportunities in broadcasting and to enable them to acquire necessary skills. The value of such efforts would be seriously impaired if such persons were thereafter deprived of notice of actual vacancies for which they might apply. We accordingly do not find the NAB plan to be a credible substitute for vacancy-specific recruitment.

79. Unlike NAB's proposal, which could be satisfied without any vacancy-specific recruitment, StBAs has submitted a proposal that would require recruitment by means of the Internet for at least 50 percent of a station's full-time vacancies, subject to a further exemption for exigent circumstances.'" We are unable to accept a proposal that exempts a certain percentage of jobs from the recruitment requirement because that could result in the most desirable jobs being filled without public recruitment. We will discuss StBAs' proposal relating to the use of the Internet below.

80. In the *Second NPRM*, we recognized that there might be occasional exigent circumstances in which recruitment may not be feasible.'" We cited as an example the need to replace immediately an employee who departs without notice and whose duties cannot be fulfilled, even briefly.

¹³⁷ See 41 C.F.R. § 60-1.20.

¹³⁸ *Report and Order*, ¶ 91, 15 FCC Rcd at 2370.

¹³⁹ StBAs Comments at 54. Forty-six of the Named State Broadcast Associations submitted a similar proposal in response to the 1998 *NPRM*; the plan at that time contemplated that stations would recruit for at least 67 percent of their full-time vacancies. *Report and Order*, ¶ 82, 15 FCC Rcd at 2367.

¹⁴⁰ *Second NPRM*, ¶ 25, 16 FCC Rcd at 22851.

by other station employees. We stated, however, in the *Report and Order* that we could not anticipate every circumstance which might justify filling a position without recruitment and indicated that we would rely on the good faith discretion of broadcasters. We nonetheless cautioned that we expected nonrecruited vacancies to be rare relative to the number of vacancies for which recruitment is conducted, because our Rule generally requires recruitment for every vacancy.¹⁴¹ We will incorporate this approach in our new rules.

81. NAB suggests that we should further clarify the circumstances in which this exigent circumstances exception applies because uncertainty in this respect could trigger allegations that a station violated the EEO Rule.¹⁴² We are unable to anticipate every circumstance in which the exigent circumstances exception might apply because it is intended to respond to emergency circumstances that are difficult to anticipate. Moreover, the applicability of the exemption may vary based on the station. Finally, the best method for defining the scope of the exigent circumstances policy is through experience based on actual cases rather than hypothetical circumstances.

82. NAB also cites the need for confidentiality in some circumstances so as not to alert an existing employee, whom the broadcaster is seeking to replace, or competitors as to its plans. In appropriate circumstances, such a situation could provide sufficient justification for a departure from the normal recruitment procedures. There are, however, recruitment sources and techniques (such as blind advertisements) that can sometimes be used to achieve a significant degree of outreach while preserving confidentiality.

83. In applying the exigent circumstances exception, we will look to the entirety of the licensee's recruitment efforts in assessing its compliance with our Rule. Our primary concern is that the licensee not abuse the exigent circumstances exception as a means of avoiding regular recruitment. In the absence of evidence of such abuse, we would not necessarily find a violation even if we disagreed with a licensee's decision as to a particular hire, as long as it is made in good faith.

84. NAB urges that we should create an exemption from our recruitment requirement for "unique" jobs, including on-air talent and general managers.¹⁴³ In some instances, the unique nature of a particular position and the need to proceed promptly to fill it may qualify as an exigent circumstance that would warrant a decision not to recruit. We will not, however, exempt whole categories of jobs from recruitment because the exigency may not exist in all circumstances. NAB also urges that we should create an exemption where it is futile to recruit. It cites as an example the case of a station seeking to hire a chief engineer or meteorologist when there is no reasonable likelihood that a qualified person would be found from an advertisement in the local newspaper.¹⁴⁴ It also suggests that there should be no requirement to conduct additional recruitment when a station has accumulated a number of resumes from qualified persons at job fairs.¹⁴⁵ These concerns are not appropriately addressed in the context of an exemption from the recruitment requirement, however, because they relate to the manner in which recruitment is conducted, which we discuss below.

¹⁴¹ *Report and Order*, ¶ 89, 15 FCC Rcd at 2369.

¹⁴² NAB Comments at 46-47.

¹⁴³ *Id.* at 47-49.

¹⁴⁴ *Id.* at 49.

¹⁴⁵ *Id.* at 50.

85. NAB suggests also that recruitment should not be required when a broadcaster has already identified a "preferred person" for a position sought to be filled. We would, in rare circumstances, recognize as an exigent circumstance the availability of a talent so unique and exceptional that a broadcaster could reasonably conclude that a comparable talent is unlikely to be found by recruitment. This would not, however, extend to all circumstances in which a broadcaster, without recruitment, has identified a "preferred" candidate because that would make recruitment effectively optional, especially for the best jobs.

86. Accordingly, the requirement that broadcasters recruit for every full-time vacancy, unless exigent circumstances exist, will become a component of our Rule. Recruitment for only some openings could leave the most desirable positions open to a limited number of potential applicants, possibly excluding significant segments of the community.¹⁴⁶ We will require that broadcasters develop and use for each vacancy a recruitment source or list of recruitment sources (which may be freely modified as circumstances warrant) sufficient to ensure wide dissemination of information about the opening.¹⁴⁷ We will not dictate the number or type of sources that a broadcaster must use. If, however, the source or sources used cannot reasonably be expected, collectively, to reach the entire community, the broadcaster may be found in noncompliance with our EEO Rule. A broadcaster may widely disseminate job postings through any combination of methods sufficient to ensure that its recruitment efforts are inclusive. Broadcasters may contact the FCC's EEO staff with any questions on this matter.

87. We also clarify that the same recruitment sources need not be used for every hire. We recognize that different positions may require different qualifications, as noted by NAB with respect to the positions of chief engineer or meteorologist. Accordingly, different recruitment sources may be appropriate to reach persons in the community likely to possess the requisite qualifications for such positions. We do not require licensees to use recruitment sources that, in their good faith judgment, are unlikely to elicit responses from qualified applicants in light of the demands of a particular job. Licensees are not required, for example, to place a job notice in the local newspaper if they do not believe in a particular situation that the newspaper would be likely to reach qualified applicants. We do expect them, however, to use whatever recruitment source or sources can reasonably be expected to widely disseminate notice of the vacancy to qualified applicants.

88. Although our Rule seeks to achieve broad outreach to the community, this does not preclude the use of regional or national recruitment sources. Such sources also promote the wide dissemination of information concerning employment opportunities. We will accordingly give consideration to a broadcaster's use of such sources in assessing its EEO record.¹⁴⁸ Moreover, in the case of the chief engineer or meteorologist type of positions noted by NAB, a source from outside the community, such as a national publication directed to engineers, might be an effective method of communicating the availability of the position to persons located within the community. For example, someone in a station's local community who has the unique qualifications to be a meteorologist may rely almost entirely on national sources to search for meteorologist jobs in broadcasting. Whatever sources a

¹⁴⁶ *Report and Order*, ¶ 85, 15 FCC Rcd at 2368

¹⁴⁷ *Id.* For example, if a broadcaster placed advertisements for a general manager position in a widely circulated local newspaper every day for a week, we would consider this recruiting effort to be sufficient to ensure wide dissemination reasonably calculated to reach the entire community. We offer this example merely to provide guidance; it does not establish a specific benchmark to meet.

¹⁴⁸ *Recon.*, ¶ 71, 15 FCC Rcd at 22568

licensee uses, however, or whatever a licensee's perception is regarding whether anyone in its community is qualified for a unique job, we are requiring that sources reach qualified potential applicants in the licensee's community. Licensees are not permitted to target any group in the community for exclusion from the recruitment process.

89. We further emphasize that our Rule requires only that the recruitment source or source, used be reasonably calculated to reach the entire community. It does not require that a broadcaster be able to demonstrate that people in any particular segment of the community actually were aware of the vacancy or applied for the position. Contrary to concerns expressed by some,¹⁴⁹ we do not require that recruitment be targeted to specific groups in the community, or that a licensee demonstrate that it obtained a response from a particular group. Furthermore, in assessing the adequacy of their recruitment sources, broadcasters may assume that persons seeking jobs will make some effort to seek out job opportunities in publicly available resources.

90. NAB proposes that broadcasters should be allowed to recruit for such positions as salespersons solely on the basis of resumes received at job fairs. Non-vacancy-specific recruitment is not, however, an adequate substitute for recruitment when vacancies arise. We have permitted broadcasters to rely upon reasonably current applications on file, however, where the applications were the product of a vacancy-specific recruitment conducted in accordance with our Rule. In *MyStar Communications Corporation*, for example, we found that applications elicited three months prior to the hire at issue were not necessarily stale.¹⁵⁰ For purposes of our present rule, we will apply a similar policy. Thus, if a broadcaster recruits in accordance with our present vacancy-specific broad outreach requirement, and in its judgment the applications received remain viable at a later date, it may make additional hires for substantially the same position originally advertised from that pool without initiating a new recruitment process. In addition, it may consider along with the previously submitted applications additional applications received at job fairs or through other non-vacancy-specific efforts.

91. MMTC requests that we clarify that, although not required, our Rule permits the use of recruitment sources targeted to minorities or females.¹⁵¹ Our Rule neither requires nor precludes the use of any specific sources a broadcaster deems appropriate to achieving broad outreach. MMTC's concern arises from language in *Association* suggesting that the use of minority-targeted sources might disadvantage non-minorities by depriving them of notice. MMTC suggests that some have construed this as meaning that the use of minority-targeted sources would constitute unlawful discrimination. We do not believe this would be true if a broadcaster were using recruitment sources sufficient to achieve broad outreach.

92. With reference to the definition of community for purposes of the broad outreach requirement, we proposed in the *Second NPRM* to define "community" as encompassing, at a minimum, the county in which a station is licensed or MVPD employees are primarily located, or the Metropolitan Statistical Area ("MSA") in the case of counties located in an MSA.¹⁵² NAB objects to this definition because counties and MSAs do not necessarily reflect a station's actual service area.¹⁵³ Upon further

¹⁴⁹ StBAs Comments at p. 51-53; NAB Comments at 39; The Local Television Group Comments at 13-20.

¹⁵⁰ *MyStar Communications Corporation*, 12 FCC Rcd 5239, 5244 (1997).

¹⁵¹ MMTC Comments at 79-84.

¹⁵² *Second NPRM*, ¶ 23, 16 FCC Rcd at 22850.

¹⁵³ NAB Comments at 43-44.

reflection. we agree. We will instead define "community" for the purpose of the broad outreach requirement in accordance with the approach taken in the *Recon*. There, we left the definition of "market" or "community" to the licensee's good faith discretion. We indicated, however, that, in making this determination, a broadcaster should assess the technical coverage of its station(s); its marketing, promotional, and advertising practices; the pertinent market definitions adopted by public agencies or commercial services, such as Nielsen and Arbitron; and requests for notices of job vacancies from locally-based community groups." We will adopt the same policy for purposes of our new Rule."

93. LTVG argues that a rule not adequately explained is an arbitrary rule and that the Commission has not adequately explained its EEO Rule." For example, LTVG claims that the Commission has not explained what it means when it directs broadcasters to reach out to all segments of the entire community under Prong I of the EEO Rule. LTVG asserts that it is impossible for broadcasters to reach out to every segment in the entire community whenever a job in broadcasting becomes available because there are an infinite number of segments, including "occupational segments, ideological segments, sociological segments, historical segments, recreational segments, political segments, philosophical segments, economic segments and so on."¹⁵⁴ In addition, LTVG argues that the language of Prong I is unclear and therefore it interprets Prong I as meaning "that a broadcaster is not 'required' to use recruitment sources specifically targeted at minorities and women, but only if it can demonstrate that it employs some alternate method of 'reaching out' to minorities and women."¹⁵⁵ LTVG also argues that the Commission has not explained why multiple recruitment sources must be used in providing notice of job openings. LTVG further argues that Prong I provides no meaningful exception for "urgent hire" or other situations where recruitment is not feasible. In addition, LTVG argues that the Commission's "logical premise that 'fairness' is not possible without the proposed 'outreach' rules is plainly invalid" because Prong I requires detailed and burdensome outreach.¹⁵⁶

94. As discussed above, under Prong I of our EEO Rule, we require only that EEO recruitment sources be reasonably calculated to reach the entire community. We do not require that broadcasters demonstrate that any particular segment of the community actually was aware of any vacancy. Nor do we require that recruitment be targeted to a specific segment or that broadcasters prove that they obtained a response from a particular segment. Prong I neither requires nor precludes the use of any number or type of sources a broadcaster deems appropriate to achieve broad outreach. Further, we leave the definition of "community" to the licensee's good faith discretion. We also recognize that it is difficult for licensees to recruit for vacancies in exigent circumstances. Thus, Prong I allows broadcasters flexibility in implementing appropriate recruitment programs for their individual circumstances.

¹⁵⁴ *Recon*, ¶ 68, 15 FCC Rcd at 22561

¹⁵⁵ Although we are according discretion regarding the definition of "community," we expect broadcasters to be able to provide a reasonable explanation for their determinations should it become pertinent. Thus, we would be concerned if the circumstances suggested that a broadcaster is unreasonably defining its community in a manner that excludes certain areas or populations that it clearly does serve.

¹⁵⁶ LTVG Comments at 18; Radio Licensees Comments at 2

¹⁵⁷ LTVG Comments at 14

¹⁵⁸ LTVG Comments at 18.

¹⁵⁹ LTVG Comments at 18-20.

95. As indicated above, StBAs has proposed that we should deem posting of job vacancies on the Internet as constituting adequate recruitment. We addressed a similar proposal in the *Report and Order*.¹⁶⁰ At that time, we expressed our concern as to the use of the Internet as a sole recruitment source based on the developmental state of broadcast association job banks and the possibility that Internet-only recruitment would disproportionately disadvantage minorities and those living in rural areas. We questioned whether industry web sites had become well known as repositories of job announcements for prospective applicants. We also questioned whether the availability of Internet access in schools and libraries provided a widespread mechanism for prospective applicants otherwise without Internet access to conduct job searches. We thus concluded that it was premature to recognize the Internet as a sole recruitment source, although we indicated that we would monitor the development of the Internet as a recruitment tool. We indicated that we would revisit the issue based on petitions demonstrating that Internet job banks (1) are well established and provides comprehensive statewide job listings; (2) are sufficiently publicized throughout the community; (3) are available to stations that are not members of the association sponsoring the Internet job bank to list their job vacancies; and (4) that computer access has become sufficiently universal so that it could be reliably assumed that an Internet job posting will be readily available to all segments of the community. Finally, we said we would review the extent to which applicants are applying for jobs as a result of web postings, whether and why any segment of the community is having particular difficulty in gaining access to such postings, and methods by which the petitioner would reach that segment of the population. In the *Second NPRM*, we requested comments as to whether we should revisit this issue.

96. The record reflects that NASBA and NAB now maintain national on-line job sites, as do almost all state broadcast associations.¹⁶¹ With respect to the MVPD industry, NCTA states that online job banks are maintained by the Walter Kaitz Foundation, which NCTA describes as the industry's diversity-focused organization, and the National Association of Minorities in Telecommunications (NAMIC), a trade association.¹⁶² Cox Communications, Inc. ("Cox"), which states that it provides MVPD services to more than six million subscribers, reports that, in 1999, it created an Internet career network to alert its employees and the general public in the communities in which it operates, as well as other areas of the country, of job vacancies at all levels of its operations. Cox indicates that its experience with the Internet career network has been quite positive.¹⁶³

97. Notwithstanding the greater availability of job-related Internet sites, the record does not reflect the extent to which the Internet has become well known as a principal resource for job seekers or the nature of any difficulties that Internet recruitment would create. We anticipated in the *Report and Order* that we would be able to assess the extent of any such difficulties based on our experience under the rules adopted therein. Because those rules were in effect for only a few months, however, we do not have the experience necessary to reach definitive conclusions in that respect.

98. With regard to the access of minority and rural populations to the Internet, our concerns arose from a series of reports by the National Telecommunications and Information Administration ("NTIA") in 1995, 1998 and 1999.¹⁶⁴ The most recent NTIA report on Internet usage was released in

¹⁶⁰ *Report and Order*, ¶ 86-87, 15 FCC Rcd at 2368-69.

¹⁶¹ NAB Comments at p. 5; StBAs Comments at 22-23.

¹⁶² NCTA Comments at 10-11.

¹⁶³ Cox Comments.

¹⁶⁴ *Report and Order*, 15 FCC Rcd at 2368 n. 174.

February 2002.¹⁶⁵ The 2002 NTIA report finds that, as of September 2001, 56.5 percent of U.S. households had a computer and 50.5 percent of U.S. households had an Internet connection. As of September 2001, 53.9 percent of individuals were using the Internet, compared with 44.5 percent in August 2000. Use of the Internet by people in rural households has grown by 24 percent over the period from 1998 to 2001 and now approaches the national average. Internet use by Blacks reached 39.8 percent in September 2001, up from 29.3 percent in August 2000 and 19.0 percent in December 1998. Internet use by Hispanics reached 31.6 percent in September 2001, up from 23.7 percent in August 2000 and 16.6 percent in December 1998. Internet use by Whites reached 59.9 percent in September 2001, up from 50.3 percent in August 2000 and 37.6 percent in December 1998. Internet usage by Asian/Pacific Islanders reached 60.4 percent in September 2001, up from 49.4 percent in August 2000 and 35.8 percent in December 1998.¹⁶⁶ Internet use by persons in the lowest income group (less than \$15,000 per year) reached 25 percent in September 2001, up from 18.9 percent in August 2000 and 13.7 percent in December 1998.

99. Proponents of the use of the Internet as a sole recruitment source cite the improvements reflected in NTIA's 2002 report.¹⁶⁷ Opponents of reliance on the Internet as a sole source note that there remain disparities in the use of the Internet.¹⁶⁸ Although the NTIA 2002 report shows increases in Internet usage, the report also indicates continuing disparities in usage among different segments of society. Indeed, only about half of all U.S. households had Internet service as of September 2001, and only slightly more than half of individuals used the Internet from any location.¹⁶⁹ Accordingly, we are unable to conclude that Internet usage has become sufficiently widespread to justify allowing it to be used as the sole recruitment source. As we indicated in the *Report and Order*, however, we will continue to monitor the viability of the Internet as a recruitment source and will consider petitions seeking to demonstrate in the future that circumstances have changed sufficiently to warrant a change in our policy.

100. As indicated in the *Report and Order*,¹⁷⁰ we expect broadcasters to allow a reasonable time after recruitment is initiated for applications to be filed before the position is filled. We recognize that occasionally a shorter time might be necessary because of extraordinary circumstances. We caution, however, that excessive instances of hires being made shortly after the initiation of recruitment could result in a finding of noncompliance if the evidence suggests that the broadcaster is not in good faith allowing adequate time for applicants to respond to its outreach efforts or is not considering their applications. MMTC suggests that we should adopt specific requirements regarding the timing of recruitment and accompanying record-keeping requirements to prevent pre-selection of the successful candidate.¹⁷¹ Such requirements would add burdens that would not necessarily achieve the desired end. We caution broadcasters and MVPDs, however, that evidence that an entity has pre-selected a successful

¹⁶⁵ National Telecommunications and Information Administration, "A Nation Online: How Americans are Expanding Their Use of the Internet" (February 2002) ("NTIA Study").

¹⁶⁶ The NTIA statistics did not provide comparable statistics on Internet usage by American Indians/Alaskan natives.

¹⁶⁷ See, e.g., NAB Comments at 40-41; StBAs Comments at 43.

¹⁶⁸ See, e.g., MMTC Comments at 112-13; NOW Comments at 6; AWRT Comments at 11; and AFTRA Comments ¶ 32.

¹⁶⁹ NTIA Study at Table 2-2.

¹⁷⁰ *Report and Order*, ¶ 90.15 FCC Rcd at 2369.

¹⁷¹ MMTC Comments at 73-74, 145.

candidate without considering the applications of other applicants will be considered in evaluating compliance with our Rule.

101. MMTC also suggests that broadcasters and MVPDs should certify that they do not rely primarily on word of mouth recruitment.” Such a certification is not necessary because we require broad outreach in filling all full-time vacancies, except for rare exigent circumstances. It is not the intention of our Rule to prohibit word of mouth recruitment. Our purpose is to ensure that word-of-mouth recruitment practices are not the sole method of recruitment and that all members of the public have an opportunity to compete for available jobs. Broadcasters are free to use non-public recruitment sources and to interview and hire persons referred by such sources, so long as they also use public recruitment sources sufficient to achieve broad outreach and fairly consider the applications generated by those sources.

102. We will continue our policy stated in the *Report and Order* that broadcasters may engage in joint recruitment efforts.” Broadcasters may also rely upon the services of outside organizations or individuals to assist it in designing or implementing their recruitment efforts.” Each broadcaster (or MVPD), however, remains individually responsible for compliance with our Rule. No broadcaster (or MVPD) is required to use the services of an outside party

103. We will not require recruitment for internal promotions, nor will we require recruitment for temporary employees. Typically, we view temporary employees as including those hired as emergency replacements for absent regular employees or those hired to perform a particular job for a limited period of time. If a person is hired full-time to perform a regular station function for an extended period of time (e.g., more than six months), however, such a hire will be treated as a permanent hire for which recruitment would be required. We recognize that some broadcasters may wish to hire employees initially on a temporary basis with the possibility of retaining them on a permanent basis if their performance is satisfactory. In such circumstances, if recruitment is done at the time of the temporary hire, any later decision to convert the employee’s status to full-time in the same, or essentially the same, job may be treated as a promotion. If an employee is hired as a temporary employee without recruitment, however, recruitment should occur if the employee is later considered for a permanent position. We caution that excessive instances of temporary hires being converted to permanent hires, without a meaningful opportunity for recruited applicants to compete, could result in a finding of noncompliance.¹⁷³

104. With respect to part-time hires, under our pre-*Lutheran Church* EEO Rule, we expected broadcasters to recruit for part-time positions but did not focus on part-time hires in our review of EEO programs.¹⁷⁶ We retained this policy in the *Report and Order*.” Thus, we provided in the Rule we

¹⁷² MMTC Comments at 72-73.

¹⁷³ *Report and Order*, ¶ 88, 15 FCC Rcd at 2369.

¹⁷⁴ *Recon*, 15 FCC Rcd at 22563 n. 48. See also StBAs Comments at 54-55; Comments of Broadcast Compliance Services.

¹⁷⁵ If an employee is hired with the expectation that successful completion of an initial probation will result in an eventual elevation to permanent status, we would not regard that as a temporary hire and would expect regular recruitment for that position.

¹⁷⁶ See, e.g., *WFSQ (FM)*, 7 FCC Rcd 6045, 6046 (1992); *Enterprise Media of Toledo, L.P.*, 12 FCC Rcd 3920, 3923-24 (1997).

adopted at that time that, for part-time hires, broadcasters need only substantially comply with the requirement to recruit for every vacancy. AWRT urges that we should apply the same recruitment requirement to part-time vacancies as is applied to full-time vacancies, citing the value of part-time positions in providing entry into broadcasting.¹⁷⁸ We agree that some positions involving less than a forty-hour **work** week are as important as full-time positions. For that reason, we will continue to define "full-time employee" as a permanent employee whose regular work schedule is thirty hours or more per week. Thus, the full recruitment and reporting requirements applied to full-time employees will cover all of these positions. For those positions involving less than thirty hours per week, however, we do not find that the record before us adequately addresses the issue of whether all or some of our recruitment requirements should apply to such employees. We are accordingly issuing below a Third Notice of Proposed Rule Making requesting comment on the issue of part-time employees. Pending the outcome of that further rulemaking, we will not apply our rules to part-time hires.

105. In the *Recon*, we indicated that, as in the case of temporary hires, if a part-time employee is initially hired after broad outreach to all segments of the community, the decision subsequently to convert him or her to full-time in the same, or essentially the same, job may be treated as a promotion. If the broadcaster did not engage in full recruitment at the time of the initial part-time hire, however, it would have to recruit before converting the employee to full-time. **Also**, as in the case of temporary hires, excessive instances of temporary hires being converted to permanent hires without a meaningful opportunity for recruited applicants to compete could result in a finding of noncompliance.¹⁷⁹ We will apply the same policy under the Rule being adopted today.

106. Outreach **Prong 2 – Notification to Community Groups**. Under the Option A rules adopted in the *Report and Order*, we required that broadcasters and MVPDs provide notification of full-time job vacancies to organizations involved in assisting job seekers upon request by such organizations. We will incorporate this requirement into our new rules. This requirement provides a "safety valve" to ensure that no segment of the community is inadvertently omitted from recruitment efforts. Organizations or other entities with ties to specific segments of the labor force, such as persons with disabilities, college students, or members of different racial, ethnic, or religious groups could help broaden the reach of recruitment efforts. Organizations that come forward to request vacancy notifications may prove to be very productive referral sources. Further, this approach will enable interested groups to more closely monitor and, if necessary, seek to improve, broadcasters' recruitment efforts.¹⁸⁰ We also expect broadcasters to make reasonable efforts to publicize the notification requirements so that qualifying groups are able to learn of the new procedure. Joint announcements by broadcasters or state broadcasters' associations – such as press releases, newspaper ads, and notices posted on the web site – would satisfy the requirement to publicize. Similarly, broadcasters and MVPDs could satisfy this requirement by individually issuing such announcements, or by providing on-air announcements.

107. We will provide broadcasters discretion to determine the method of providing notice to requesting parties. Such methods may include electronic mail and facsimile which may require fewer

¹⁷⁷ *Report and Order*, ¶ 110, 15 FCC Rcd at 2375-76

¹⁷⁸ AWKT Comments at 9-11; *see also* NOW Comments at 8-10

¹⁷⁹ *Recon*, ¶ 67, 15 FCC Rcd at 22567

¹⁸⁰ StBAs Comments at 54. (StBAs supported retention of this requirement in the context of its recruitment proposal.)

personnel and financial resources to fulfill the notification requirement than more traditional methods. For example, a broadcaster may maintain an electronic list of recruitment sources and notify all the sources simultaneously with a single e-mail when a vacancy occurs. We will also allow notifications to be made as part of joint recruitment efforts among broadcasters. However, each broadcaster participating in the joint recruitment efforts remains individually responsible for ensuring that requested notifications relating to its employment unit are made. For example, a state broadcast association may have a job bank that notifies certain sources on behalf of an employment unit when a vacancy becomes available at that employment unit. As long as the state broadcast association notifies all organizations requesting vacancy announcements from that employment unit as part of this process, the employment unit itself need not do so. Therefore, given the flexibility provided by electronic forms of notice and joint recruitment, we expect that the notification requirement will place minimal burdens on broadcasters.

10X. An organization that wishes to be notified of vacancies need only notify a broadcaster once in order to be entitled to notification of all future full-time vacancies. However, if a broadcaster is uncertain as to the status or continuing interest of a particular group, it is free to contact the group to resolve any questions. So long as the group indicates its continued interest in receiving notifications, it is entitled to receive them.

109. The obligation to notify recruitment sources that request notice of vacancies is intended as a supplement to, not a substitute for, broadcasters' core, non-delegable obligation to widely disseminate information concerning all job vacancies. Although recruitment sources will have the right to ask broadcasters for notices of vacancies, they have no obligation to do so. And even if a broadcaster does not receive a single request for notice of vacancy information, it will nevertheless be responsible for ensuring that notice of vacancies is widely disseminated. If it fails to do so, it is not a legitimate excuse that no recruitment organizations requested notices.

110. The requirement to send job notices to qualifying entities requesting vacancy announcements sets no limit on the number of entities that may request notifications. The Local Television Group ("LTVG") argues that this could potentially result in hundreds of entities requesting notifications and unwieldy burdens being imposed on a licensee, and is therefore arbitrary and capricious.¹⁸¹ It is not our intention to make this requirement unreasonable or unmanageable. During the period that this requirement, which was adopted in the *Report and Order*, was in effect in 2000 and 2001, the Commission received no information indicating that it was burdensome. Furthermore, no new evidence has been presented in this proceeding indicating that licensees were overly burdened by the requirement when it was in effect. Based on the record, there does not appear to be a need to set maximum limits on the number of notification requests. If, however, we receive evidence that this requirement imposed an excessive burden, we will revisit this issue.

111. LTVG also argues that the Commission's assertion that "the expansive 'Prong 2' 'safety valve' requirement is also necessary appears to be inadequately explained, and therefore arbitrary."¹⁸² It further alleges that Prong 2 appears to be arbitrary because it would "effectively delegate to private entities the authority to require what the FCC itself states the proposed 'outreach' rules are not intended

¹⁸¹ LTVG Comments at 20-22.

¹⁸² LTVG Comments at 20-21.

to require: "the use of recruitment sources that are specifically targeted at minorities, women or any other group."¹⁸³

112. Prong 2 of the EEO Rule requires broadcasters and MVPDs to provide requested notification of full-time job vacancies to organizations involved in assisting job seekers, regardless of whether they are minority or women's organizations. As explained above, the notification requirement provides a "safety valve" to ensure that no segment of the community is inadvertently omitted from recruitment efforts. This neutral requirement allows community groups to become actively involved in broadening the outreach of recruitment efforts. Contrary to LTVG's arguments, this requirement increases inclusiveness in sources and does not exclude any segment.

113. Outreach **Prong 3 – Menu Options**. Under the Rules adopted by the *Report and Order*, we required, under Option A, that broadcasters and MVPDs engage in a specified number of activities selected from a menu of options, such as job fairs, community events relating to broadcast employment, internship programs, scholarships, and similar activities. These activities are designed to go beyond the normal recruitment activities directed at filling particular vacancies. They are designed to encourage outreach to persons who may not be aware of the opportunities available in broadcasting or the MVPD industry or have not yet acquired the experience to compete for current vacancies. Thus, interested members of the community will not only have access to information concerning specific job vacancies, but also will be encouraged to develop the knowledge and skills to pursue them. This approach remains justified and is not unduly burdensome. Various menu options encourage outreach to students and others who would benefit from training, mentoring and scholarships, which can work to enhance the employability of persons seeking jobs in the broadcasting or MVPD industries. These menu methods of outreach also are designed to further broaden outreach efforts to reach segments of the labor force who may be inadvertently omitted from vacancy-specific recruitment. As indicated above, under this approach, broadcasters and MVPDs have great flexibility to design the types of recruitment activities best suited to their organizations and communities. In the Rule we are adopting today, we will adopt this requirement while providing additional flexibility by incorporating additional menu options that have been suggested by the parties. We are also reducing the number of menu options that employment units located in smaller markets must perform.

114. The first three specific menu options include participation in at least four job fairs by station personnel who have substantial responsibility for hiring decisions; hosting at least one job fair; or co-sponsoring at least one job fair with an organization in the business and professional community whose membership includes substantial participation of women and minorities. Job fairs are a useful method to reach a broad range of individuals who are interested in employment in the industry. The fourth option is participation in at least four activities sponsored by community groups active in broadcast employment issues, including conventions, career days, workshops and similar activities. Such participation will enable broadcasters to establish relationships with groups in the community that might otherwise be overlooked. The fifth option is the establishment of an internship program designed to assist members of the community to acquire skills needed for broadcast employment. Such an endeavor would serve the goal of broad outreach by increasing the number of qualified potential employees not only for one broadcaster, but for all broadcasters in the area. The sixth option is participation in general (as opposed to vacancy-specific) outreach efforts by such means as job banks or Internet programs such as those described in the model program developed by NASBA. While such sources may be used as recruitment sources when specific vacancies occur, they can also be useful even when there is no specific vacancy to elicit interest from persons who may later be considered for a specific position. The seventh

¹⁸³ LTVG Comments at 22.

option is Participation in scholarship programs directed to students desiring to pursue a career in broadcasting. The benefit of this outreach is that it attracts students of both genders and all races to careers in broadcasting, ultimately increasing the number of qualified potential employees. The eighth and ninth options are, respectively, the establishment of training and mentoring programs designed to enable station personnel to acquire **skills** that could qualify them for higher level positions. These options would not be satisfied by ordinary training required for employees to perform their current positions. These options are rather intended to increase employee skills so they can qualify for higher positions.

115. The tenth option is participation in at least four events or programs relating to career opportunities in broadcasting sponsored by educational institutions. Such participation again serves the purpose of increasing the universe of potential employees from which broadcasters attract job applicants. For instance, it is stated in the NASBA program submitted as an attachment to StBAs' comments that it is important that educational institutions perceive broadcasting as a rewarding career for their students and offer courses and experiences that will be helpful to students who may choose a career in broadcasting.¹⁸⁴ The eleventh option includes sponsorship of at least two events in the community designed to inform the public as to employment opportunities in broadcasting. Such activities can serve to increase public awareness of the opportunities available in broadcasting. The twelfth option would entail listing each upper-level opening in a job bank or newsletter of a media trade group with a broad-based membership, including participation of women and minorities.

116. We propose to add to the specific menu options some new ideas proposed by commenters. The thirteenth option will consist of providing assistance to outside non-profit entities in the maintenance of web sites that provide counseling on the process of searching for broadcast employment and/or other career development assistance pertinent to broadcasting. The fourteenth option consists of providing training to management level personnel as to methods of ensuring equal employment opportunity and preventing discrimination. The fifteenth option consists of providing training to personnel of outside recruitment organizations that would enable them to better refer job candidates for broadcast positions."

117. The sixteenth option (which was the thirteenth option in our former Rule) includes participation in activities other than the fifteen listed options that the licensee has designed to further the goal of disseminating information about employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities. This will provide flexibility for worthwhile initiatives that broadcasters may develop but that are not strictly within the scope of the menu options we have specified. The inclusion of this option makes it clear that the list of menu options is an open-ended list intended to guide, rather than limit, broadcasters and **MVPDs**.

118. NOM; urges that we should clarify and quantify the amount of effort that broadcasters must devote to the menu options.¹⁸⁶ We decline to do so because any quantification we might provide would unduly restrict needed flexibility. We caution, however, that token efforts will be found inadequate.

¹⁸⁴ 46 Named StBAs Comments at Exhibit 1, p. 2

¹⁸⁵ MMTC Comments at 116-19; AFTRA Comments ¶ 35; statement of Charles Warfield, President and Chief Operating Officer of ICBC Broadcast Holdings, June 24, 2002, EEO *En Banc* Hearing, Tr. 102.

¹⁸⁶ NOW Comments at 11-13

119. In the *Report and Order*, we required station employment units with more than ten full-time employees to implement four of these options every two years. For example, a broadcaster could fulfill this requirement by, during a two-year period, hosting one job fair, establishing an internship program, participating in a scholarship program, and co-sponsoring one job fair with an organization in the business and professional community whose membership includes participation of minorities and women.¹⁸⁷ This requirement will be incorporated into our new Rule. The two-year period will generally extend from the time a licensee files its renewal application to the second, then fourth, and then sixth anniversary thereof. Initially, it will extend from the effective date of the Rule until the next pertinent anniversary. If that time period is less than two years, the number of menu options may be reduced proportionally to the amount of time available. Thus, if a station is required generally to perform four menu options every two years, it would be expected to perform one for each six-month period between the effective date of the Rule and the next regular pertinent anniversary. Although we ordinarily do not dictate when a broadcaster must complete its menu options during the regular two-year period, when a broadcaster owns a station or stations for less than the full two-year period, it must complete the prorated number of menu options within the available time period. As discussed below, we will require employment units with five to ten full-time employees as well as employment units in certain smaller markets to perform two of the menu options every two years.

120. We will also permit broadcasters to perform menu options on a joint basis, either with other broadcasters, organizations such as state broadcaster associations, or with a corporate licensee's corporate headquarters. However, a station seeking credit for a particular menu option performed on a joint basis must have a meaningful involvement in the activity for which credit is sought. It is not sufficient for the station merely to lend its name to an activity or provide money where the activity is otherwise entirely conducted by another entity such as a trade association or the licensee's corporate headquarters. In the *Recon.* we discussed a number of circumstances where credit might be sought for activities engaged in on a joint basis.¹⁸⁸ This discussion remains applicable to joint efforts engaged in pursuant to the rules we are adopting herein, and are discussed below.

121. For example, with respect to the hosting of job fairs, this option could be performed on a joint basis, subject to the qualification that each broadcaster must participate in a meaningful way in the planning and implementation of the event. Insofar as a particular broadcaster's participation amounts to little more than attendance at the job fair, then it can only claim credit for such attendance, even if it has been nominally designated a cosponsor.

122. We note that the term "sponsor" as used in connection with several options set forth in Section 73.2080(c)(2) of the old Rule, which we also use in our new Rule, was apparently misunderstood by some as referring only to a financial contribution. Our intent for the purpose of these options is that a "sponsor" should have a meaningful input into the planning and implementation of a specified event. Simply lending one's name or making a monetary contribution would not be sufficient. Events can be jointly sponsored, so long as each broadcaster seeking credit for sponsoring the event is actively involved in planning and implementing the event.

123. With respect to the maintenance of a scholarship program by a corporate licensee, it is reasonable for a corporate licensee to maintain a scholarship program for those employment units it owns. Any such scholarship program, however, should incorporate involvement by the employment units for

¹⁸⁷ *Report and Order*, ¶ 103, 15 FCC Rcd at 2373 ?

¹⁸⁸ *Recon.*, ¶ 56-60, 15 FCC Rcd at 22564-65

which credit will be claimed in such areas as the design of the program, the solicitation of prospective scholarship recipients, the interviewing and selection of scholarship recipients, on-air promotion of the program, and evaluation of the effectiveness of the program. While each employment unit need not be involved in even aspect of the program, meaningful involvement in the program is essential to ensure that the employment unit is fulfilling its responsibility under our Rule. In addition, the number of employment units seeking credit for a scholarship program should bear a reasonable relationship to the number or type of scholarships awarded by the corporate licensee.

124. Unrelated broadcasters may also jointly maintain a scholarship program, which could be done through a state or local broadcast association, including efforts by such associations to coordinate regional efforts. Again, however, we believe that the program should incorporate meaningful involvement by each broadcaster seeking credit for the initiative in such areas as the design of the program, the solicitation of prospective scholarship recipients, the interviewing and selection of scholarship recipients, on-air promotion of the program, and evaluation of the effectiveness of the program. As in the case of corporate scholarship programs, the number or type of scholarships awarded by the joint scholarship program would have to bear a reasonable relationship to the number of employment units seeking credit for it.

125. With respect to mentoring, internships, or training programs administered by a corporate licensee, employment units of the licensee could claim credit for such a program even if not implemented in the community where the employment unit is located, but only so long as personnel from the employment units are participants in the mentoring, internships or training program. Similar questions arose under our former Rule as to job fairs hosted by a corporate licensee. We would credit individual employment units with cohosting the job fair only to the extent that personnel from the unit were involved in planning and implementing the job fair. Employment units of the licensee could be credited with attendance at the job fair, but only if personnel from the employment unit with substantial responsibility in making hiring decisions at the unit in fact participated in the job fair. Put otherwise, although the corporate headquarters can assist in the implementation of menu options, personnel from the respective employment units must also be involved in implementation should they seek credit for participation.

126. LTVG argues that some of the requirements of Prong 3 have been inadequately explained and are therefore arbitrary.¹⁸⁹ It also argues that because the requirements have no rational connection to the Commission's stated purpose for the outreach rules (assuring fair opportunity to all job seekers through broad and inclusive outreach in recruitment), any effort to justify them based on this purpose would be arbitrary. LTVG claims that the requirements are also arbitrary because there is no rational basis for using the coercive power of federal law to induce more people to pursue careers in broadcasting when there is no shortage of qualified employees in the broadcast industry. LTVG further claims that Communications Act does not empower the FCC to adopt the Prong 3 requirements and, even if it does, the requirements would almost certainly be invalid under the First and Fifth Amendments to the Constitution.

127. As explained above, the EEO Rules adopted by the *Report and Order* under Option A required broadcasters and MVPDs to engage in activities selected from a broad menu of options, such as job fairs, community events relating to broadcast employment, internship programs, scholarships, and similar activities. These Prong 3 activities are designed to go beyond the normal recruitment activities directed at filling particular vacancies in order to encourage outreach to persons who may not be aware of the opportunities available in broadcasting or the MVPD industry or have not yet acquired the experience

¹⁸⁹ LTVC Comments at 23-27.

to compete for current vacancies. Thus, interested members of the community will not only have access to information concerning specific job vacancies, but also will be encouraged to develop the knowledge and skills to pursue them. As stated earlier, Prong 3 activities are intended as a method to reach segments of the community who might otherwise be omitted, possibly inadvertently, from vacancy-specific recruitment efforts.”

128. **Outreach Requirements of Religious Broadcasters.** In the NPRM, we proposed to adopt a policy under which religious broadcasters that elected to apply a religious qualification to all of their employees were not required to comply with the broad outreach recruitment requirement or the menu options, but they must make reasonable, good faith efforts to recruit applicants, without regard to race, color, national origin or gender, among those who are qualified based on their religious belief or affiliation.¹⁹¹ We adopt that policy. This approach reflects our judgment that the more specific recruitment requirements described above may not be suited to recruitment that is limited to members of a certain religious faith. This requirement will also apply to religious broadcasters that elect to establish a religious qualification for some, but not all, of their positions, with respect to those positions that are subject to the religious qualification. Such religious broadcasters, with respect to other positions not subject to a religious qualification, must comply with prongs one and two. A religious broadcaster that treats five or more its full-time positions as non-religious are required to comply with the prong three menu options because, in regard to those positions, the station is in a comparable position to stations that have five or more full-time employees and none subject to a religious qualification. A religious broadcaster electing to treat none of its positions as subject to a religious qualification would be required to comply with all three prongs.

129. **Trinity Broadcasting Network (“TBN”)** objects to the requirement that a religious broadcaster that establishes a religious qualification make reasonable, good faith efforts to recruit applicants who are qualified based on their religious belief or affiliation on the grounds that it would put the Commission in the position of determining which persons are so qualified.¹⁹² This is not the case. Once an entity establishes its qualifications as a religious broadcaster, it has the discretion to define the religious qualification it seeks to establish. Thus, it may define the qualification generally as encompassing an entire denomination; more specifically as encompassing only persons who share a particular doctrinal belief; or even more specifically as encompassing only persons who are members of a particular church or religious organization. We do not intend to inquire into a religious broadcaster’s definition of its religious qualification. All we require is that some effort be made to notify persons who meet the definition established by the religious broadcaster itself as to the availability of employment at the religious broadcaster’s station.

130. **Outreach Requirements for Noncommercial Broadcasters.** Several commenters representing noncommercial broadcasters suggest that we do not need to impose our EEO requirements on noncommercial broadcasters, such as stations operated by governmental or public educational entities, because they are subject to EEO requirements imposed by other Federal, state or local governments, or policies prescribed by the governmental or educational entity itself.¹⁹³ We are not persuaded. The

¹⁹⁰ These types of non-vacancy-specific outreach efforts have been advocated by some broadcasters. See NAB Comments at 22-27; statement of Marilyn Kurhak, Vice President of Midwest family Broadcasters, June 24, 2002 EEO *En Banc* Hearing at Tr. 30-34.

¹⁹¹ *Recon* ¶ 78, 15 FCC Rcd at 22570.

¹⁹² TBN Comments.

¹⁹³ Comments of Association of Public Television Stations; Comments of National Public Radio; Comments of

proposal to exempt non-commercial broadcasters from our EEO rules would, like the **NAB** proposal to rely on programs developed by state associations, be confusing to the public and difficult to enforce. We can not merely assume that a broadly defined class of stations is necessarily subject in each instance to an effective alternative to our requirements, and, even if we could, reliance on such alternate programs would put us in the untenable position of having to resolve whether a broadcaster had violated requirements of other agencies in order to determine whether it was in compliance with our rules.""

131. Outreach Requirements for International Stations. In the *Recon*, we indicated that international broadcast stations licensed pursuant to Section 73, Subpart F, Sections 73.701, *et seq.*,¹⁹⁵ would be subject to our EEO requirements, except for the public file requirement, discussed below, given that such stations are not required to have a public file.¹⁹⁶ We are continuing this requirement in the new rules.

132. Recordkeeping. We will require broadcasters to retain documentation concerning their compliance with the three recruitment prongs, as proposed in the *Second NPRM*.¹⁹⁷ This documentation must be retained by the station, but will not be routinely submitted to the Commission. The data must, however, be provided to the Commission upon request in the event of an investigation or audit. The documentation includes: (1) listings of all full-time job vacancies filled by the station employment unit, identified by job title; (2) for each such vacancy, the recruitment sources used to fill the vacancy (including, if applicable, organizations entitled to notification, which should be separately identified), identified by name, address, contact person and telephone number; (3) dated copies of all advertisements, bulletins, letters, faxes, e-mails, or other communications announcing vacancies; and (4) documentation necessary to demonstrate performance of the Prong 3 menu options, including sufficient information to disclose fully the nature of the initiative and the scope of the station's participation, including the station personnel involved. This documentation will allow us to verify compliance with our rules; we find no reason to believe that this minimal record retention requirement imposes an unreasonable burden on broadcasters or MVPDs.

133. We also sought comments in the *Second NPRM* as to whether we should require the retention of documentation concerning the recruitment sources that referred hires and interviewees. MMTC urges that we should adopt the requirement in order to ensure that the recruitment process is conducted in good faith and to determine whether recruitment sources are productive in generating applicants.¹⁹⁸ NOW urges us to require retention of records concerning the referral sources of applicants."" StBAs opposes tracking the referral sources of interviewees or hires because, it contends, the real purpose is to unconstitutionally track minority and female interviewees and hires using

State University of New York; and Comments of School Board of Broward County Florida.

¹⁹⁴ We wish to make clear that a noncommercial licensor can claim credit for efforts made pursuant to other regulations that also comply with our requirements. Thus, if stations are subject to EEO requirements that are the same or more extensive than ours, they would most likely be in compliance with our rules and our rules would impose no additional burden.

¹⁹⁵ 47 C.F.R. Part 73, Subpart F, §§ 73.701 *et seq.*

¹⁹⁶ *Recon*, 15 FCC Rcd at 22562 n.45

¹⁹⁷ *Second NPRM*, ¶ 32, 16 FCC Rcd at 22853

¹⁹⁸ MMTC Comments at 140-44.

¹⁹⁹ NOW Comments at 15-16.

recruitment sources as "proxies for persons of certain races, ethnicities and genders." It suggests that the process, not the results, is the relevant focus of our rules.²⁰⁰ NCTA argues that documentation verifying that recruitment occurred is sufficient and that collection of data regarding the recruitment sources of hires and interviewees is unnecessary.²⁰¹

134. Our Rule focuses on the process of recruitment, not the results thereof. It is nonetheless necessary to have some means of assessing whether the process has been conducted in good faith and whether the process is working as intended. We expect that broadcasters and MVPDs will analyze the results of their recruitment efforts to ensure that they actually achieve broad outreach. This requires knowledge of what recruitment sources have been productive in generating qualified applicants. Records of the recruitment sources of the most qualified applicants – those interviewed or hired – will be helpful in this regard. We will accordingly require that broadcasters and MVPDs maintain records reflecting the referral sources of interviewees and hires.

135. We will not require the retention of records of the recruitment sources of applicants. Data concerning the recruitment sources of interviewees and hires is sufficient for the limited purpose of determining whether the program is being conducted in good faith and working as intended. Further, although it is minimally burdensome to ascertain the recruitment sources of interviewees and hires because they are readily available to provide this information if it is not reflected in the jobseeker's application, tracking the recruitment source of all applicants may require additional efforts to collect this information. This may place an inordinate burden on broadcasters and MVPDs, particularly in light of the fact that information concerning applicants in the aggregate does not necessarily reflect sources of *qualified* applicants.

136. StBAs' suggestion that our recruitment tracking requirement is surreptitiously intended to track the number of minorities and females in applicant pools is baseless. Nothing in our rules requires, or gives preference, to the use of minority or female oriented recruitment sources. Indeed, minorities and females likely are referred by all sources, including the Internet or newspapers, so that it is impossible to draw any conclusion as to the numbers of minorities and females interviewed or hired based solely on the identity of recruitment sources.

137. We will require that all records documenting outreach efforts be retained until the grant of the renewal application covering the license term during which the hire or activity occurs, except that, if a licensee acquired a station pursuant to an assignment or transfer that required Commission approval of FCC Form 314 or 315 during the license term, it need not retain records pertaining to the outreach efforts of a prior licensee. In order to minimize any burden associated with this requirement, records may be maintained in an electronic format, e.g., by scanning pertinent documents into a computer format. Absent a showing of extraordinary circumstances, we will not credit claimed activities that cannot be supported by records.

138. In the case of religious broadcasters that apply a religious qualification to some or all of their hires, they need only retain, in the case of hires subject to the qualification, documentation as to the full-time vacancies filled, the recruitment sources used, the date each vacancy was filled, and the recruitment sources of the hires. This information is pertinent to monitoring whether the broadcaster

²⁰⁰ StBAs Comments at 41-42

²⁰¹ NCTA Comments at 15

made reasonable, good faith efforts to recruit among persons who meet the applicable religious qualification."²⁰²

139. Public File. We will adopt the requirement that broadcasters place in their public file annually, on the anniversary of the date they are due to file their renewal applications, an EEO public file report containing the following information: (1) a list of all full-time vacancies filled by the station employment unit during the preceding year, identified by job title; (2) for each such vacancy, the recruitment source(s) used to fill the specific vacancy (including organizations entitled to notification of vacancies pursuant to Prong 2, which should be separately identified), including the address, contact person, and telephone number of each source; (3) a list of the recruitment sources that referred the people hired for each full-time vacancy; data reflecting the total number of persons interviewed for full-time vacancies during the preceding year and, for each recruitment source used in connection with any such vacancies, the total number of interviewees referred by that source; and (4) a list and brief description of Prong 3 menu options implemented during the preceding year.²⁰³ Religious broadcasters with hires subject to a religious qualification need include, for full-time vacancies subject to the qualification, only the information called for in (1) and (2) above, along with information concerning the recruitment sources that referred the persons hired."²⁰⁴

140. Some broadcasters object that documentation concerning a station's EEO efforts should not be made available to the public.²⁰⁵ To the contrary, as we indicated in the *Report and Order*, the public has an important role in monitoring broadcaster compliance with our EEO Rule.²⁰⁶ The EEO public file report is designed to facilitate meaningful public input. We recognize broadcaster concerns that the availability of this information could trigger unwarranted, even frivolous, filings."²⁰⁷ Nonetheless, the possibility of abuses by some does not warrant depriving the public of its right to participate in the process of monitoring and enforcing our EEO Rule, which directly impacts them.

141. We will also require that broadcasters post the EEO public file report on their web site, if they have one.²⁰⁸ The purpose of this requirement is to facilitate access by persons within the service area. We do not believe that our requirement to place EEO public file report information on a station's web site is unreasonable or overly burdensome. In the *Recon*, we denied NAB's request that we

²⁰² *Recon*, ¶ 79, 15 FCC Rcd at 22570.

²⁰³ We recognize that in some years the licensee may not have implemented any outreach initiatives. If a broadcaster has deferred its initiatives to the second year of the implementation cycle, it may indicate "none" in the EEO public file report for the first year, accompanied by an appropriate explanation.

²⁰⁴ *Recon*, ¶ 80, 15 FCC Rcd at 22570.

²⁰⁵ StBAs Comments at 55.

²⁰⁶ *Report and Order*, ¶ 123, 15 FCC Rcd at 2379.

²⁰⁷ NAB Comments at 36; Statement of Ann Arnold, Executive Director, Texas Association of Broadcasters at EEO *En Banc* Hearing, Tr. 41-43.

²⁰⁸ Although the reports must be retained in the public file until final action has been taken on the station's next renewal application, all reports need not be maintained on the station's web site. The requirement to post a station's EEO public file report on its web site extends only to the current report. Also, we require only that the information contained in the EEO public file report be placed on the web site. A scanned copy of the actual paper report contained in the public file need not be placed on the web site; any legible format may be used.

eliminate the requirement because of the alleged burden that it placed on broadcasters. We found that **NAB** had failed to establish the extent of any such burden or the costs involved in addressing them.²⁰⁹ In this proceeding, **NAB** cites data from another proceeding in which we proposed to require that television Stations post their entire public file on their own web site or a state association web site.²¹⁰ That data, however, pertains to the posting of as much as 14,000 pages of documentation. The requirement at issue here involves only a single document. **Also**, it does not require web posting unless the station already maintains a web site; it does not require that one be created. **NAB** provides no additional documentation as to the possible burden of this requirement beyond that which we found insufficient in the *Recon*.²¹¹ **NAB** also contends that the requirement to place the EEO public file report on a station's web site, if it has one, might deter stations that do not currently have web sites from initiating them. We find this suggestion speculative, at best. Finally, **NAB** objects to the requirement because it would make the EEO public file report available to persons outside of a station's community. **As** we indicated in the *Recon*, the purpose of the requirement is to facilitate access by persons within the station's service area. That persons outside the service area may also access it is immaterial.²¹²

142. **As** we indicated in the *Report and Order*,²¹³ broadcasters are free to use any format in their public file report to avoid unnecessary duplication as long as the report clearly provides the information requested. For instance, if a broadcaster used the same recruitment sources for all its vacancies, it may maintain a single list of those sources, indicating that they were used for all vacancies. If a broadcaster used different sources for different vacancies, it may maintain a master list of all its sources and use a cross-reference system to show which sources were used for which vacancies.

143. The EEO public file report need not be routinely submitted to the Commission, except in two instances. The EEO public file reports covering the two-year period preceding the filing of a renewal application must be submitted with that application as an attachment to Form 396, and will be one basis for our review of the broadcaster's compliance at renewal time. **Also**, for stations subject to mid-term reviews, the EEO public file reports for the two-year period preceding the mid-term review must be filed with the Commission and will be one basis for mid-term reviews. Renewal and mid-term review procedures are discussed in greater detail below.

144. Because the filing dates for the EEO public file reports are tied to the date of filing of renewal applications, the due dates will apply to a given station regardless of when the licensee acquired the station. Consequently, if there is a substantial change of ownership requiring approval pursuant to FCC Form 314 or FCC Form 315 during the one-year period covered by an EEO public file report, the

²⁰⁹ *Recon*, ¶ 32-33, 15 FCC Rcd at 22558.

²¹⁰ *Notice of Proposed Rule Making in MM Docket No. 00-168*, 15 FCC Rcd 19816 (1000), cited in **NAB** Comments at 29-33.

²¹¹ In addition, according to a 2001 survey, 91 percent of television stations and 75 percent of radio stations operate web sites. Furthermore, 91 percent of television stations post local news on their web sites and numerous stations have elaborate and sometimes continuously updated special features such as neighborhood weather forecasts. "RTNDA/Ball State University, Radio and Television Web Survey (2001)," available at <http://www.rtna.org/technology/web.shtml#survey>. Cited by NOW Reply Comments at 23.

²¹² *Recon*, ¶ 33, 15 FCC Rcd at 22558.

²¹³ *Report and Order*, ¶ 124, 15 FCC Rcd at 2380.

new licensee must place the report in the public file by the due date. However, the information contained in the report would encompass only EEO efforts undertaken by the new licensee.

145. AWRT suggests that the EEO public file report be filed with the Commission annually or that reports for the four preceding years should accompany mid-term and renewal filings in order to provide a more complete picture of the licensee's EEO record.²¹⁴ We will partially adopt this proposal by requiring EEO public file reports for the two years preceding the filing of mid-term reports and renewal applications. This will be sufficient for our ordinary review of licensees' EEO compliance and will cover the full two-year period that stations have to comply with the Prong 3 menu options. Of course, we will request additional reports and other information if we deem it necessary. Also, the public can bring to our attention any problems they perceive in the EEO public file reports that we do not review. As indicated, licensees will be required to retain the reports in their public file until their next renewal is granted.

146. The EEO public file report will be filed for station employment units, rather than only for individual stations. A "station employment unit" will be defined, as it was under our former Rule, as including a station or group of commonly owned stations in the same market that shared at least one employee.²¹⁵ We will leave the definition of the "market" to each licensee's good faith discretion. In making this determination, however, a licensee should assess the technical coverage of its station(s); its marketing, promotional, and advertising practices; the pertinent market definitions adopted by public agencies or commercial services, such as Nielsen and Arbitron; and requests for notices of job vacancies from locally-based community groups. We expect a licensee to be able to provide a reasonable explanation for its determination should it become an issue. Finally, stations in the same market should be considered part of the same employment unit even if the licenses are held by different business entities that are commonly owned or controlled. We would view licensees as commonly owned for the purpose of the EEO Rule if 50 percent or more of the voting control of the licensees is held by the same persons or entities.

147. If a station is subject to a time brokerage agreement, the licensee's EEO public file report should include data concerning only its own recruitment efforts for full-time positions and not the efforts of the broker. If a licensee is a broker of another station or stations in the same market as an employment unit including a station or stations of which it is the licensee, the licensee's EEO public file report should include data concerning its EEO efforts at both the owned and brokered stations. If a licensee-broker does not own a station in the same market as the brokered station, then it shall include information concerning its EEO efforts at the brokered station in the EEO public file report for its own station that is geographically closest to the brokered station. The same policy will apply to EEO forms filed at mid-term (where applicable) (Form 397) and at renewal (Form 396), discussed below. Non-licensee brokers are not required to file EEO public file reports because they are not licensees. If a broker is controlled directly or indirectly by a licensee or licensees, however, it should be considered a licensee-broker.

148. We recognize that there may be some employment units that are located in markets that include stations licensed to communities in more than one state that are in different renewal groups. As a result, the date of the last renewal application filing differs for some stations in the same employment unit, so that there could arguably be two dates governing the placing of the EEO public file report in the public file because that date is based on the anniversary of the filing of the last renewal application. The same problem arises with respect to the filing of mid-term reports (FCC Form 397), discussed below. It

²¹⁴ A WRT Comments at 15.

²¹⁵ *Report and Order*, ¶ 108, 15 FCC Rcd at 2375

is not our intent that employment units comply with these requirements more than once merely because they include stations in more than one renewal group. Accordingly, we will generally expect employment units in this situation to proceed in accordance with the schedule for only one of the renewal groups included in their unit. There may be rare instances involving television stations, however, when it will be necessary for us to request a supplemental filing in order to comply with the statutory requirement that we conduct mid-term reviews of television licensees' EEO compliance.

149. An employment unit consisting of stations in more than one renewal group may select the renewal group that it will use for the purpose of determining the filing dates for its annual public file reports and its mid-term report, where applicable, in accordance with the following criteria. If the employment unit includes a television station, the dates for the television station should ordinarily govern, in order to accommodate the statutory requirement for mid-term review of television licensees' EEO compliance. Apart from this situation, the renewal group that will determine the employment unit's EEO filing schedule should be selected so as to minimize the time between the date for placing the EEO public file report in the public file and the date for the filing of renewal applications for stations located in renewal groups that have different renewal filing dates than the renewal group used to determine the employment unit's EEO filing schedule.²¹⁶

150. There may also be circumstances in which an employment unit consists of television and radio stations that are part of the same renewal group, except that the renewal schedule for radio is one year earlier than the schedule for television.²¹⁷ In these circumstances, the filing schedule for television stations should be used for purposes of filing the mid-term report (FCC Form 397) for the employment unit, if it is subject to the requirement to file a mid-term report. This report would cover all stations in the employment unit. Thus, there would be no need to file a separate mid-term report for the radio station(s). Because the date for placing the annual public file report in the public file is the same for both radio and television, the most recent public file report should be submitted with the renewal applications for both television and radio stations in the employment unit."

151. Renewal applications must still be filed separately for each station in accordance with the regular schedule for the station's renewal group. FCC Form 396, the EEO form submitted with the renewal application, discussed below, requires that the licensee attach the EEO public file report that is ordinarily placed in the public file simultaneously with the filing of the renewal application, as well as the report for the prior year. When a station is part of an employment unit that is using the EEO filing schedule for another renewal group, the station should submit with its FCC Form 396 the most recent EEO public file report prepared for the employment unit.²¹⁹ If the licensee feels that the most recent EEO

²¹⁶ *Recon.*, ¶ 74, 15 FCC Rcd at 22569.

²¹⁷ For instance, in the case of the North Carolina and South Carolina renewal group, the next renewal applications for radio stations are due by August 1, 2003, whereas the next renewal applications for television stations are due by August 1, 2004.

²¹⁸ Thus, a radio station in North Carolina would submit with its renewal application the report placed in the public file on August 1, 2003, and a North Carolina television station in the same employment unit would submit the report placed in the public file on August 1, 2004.

²¹⁹ For instance, an employment unit consisting of radio stations licensed to communities in both Kansas and Missouri might choose to utilize the dates applicable to the renewal group that includes Kansas for EEO filing purposes. The Missouri station(s) in the employment unit will still file its next renewal application on October 1, 2004, the regular filing date for Missouri radio renewals. However, because the employment unit will use the EEO filing schedule for Kansas, the Missouri renewal applicant should attach to its FCC Form 396 the EEO public file

public file report does not accurately reflect the employment unit's EEO program as of the date of the filing of the renewal application, it should disclose any pertinent facts as part of the narrative statement also required by the FCC Form 396.

152. Low power television (LPTV) stations are subject to the broadcast EEO Rule by virtue of a cross-reference contained in Section 74.780 of the Commission's Rules.²²¹ However, LPTV stations are not required to maintain a public file. As indicated in the *Recon*, we will not expect them to prepare an EEO public file report, although LPTV stations with five or more full-time employees must comply with the recordkeeping requirements.²²² Class A television stations, however, are subject to the requirement to maintain a public file and are fully subject to the EEO Rule, including the requirement to prepare an EEO public file report.

153. Enforcement. We will adopt the enforcement process proposed in the *Second NPRM*, which is similar to that adopted in the *Report and Order*, except that we are eliminating the requirement that broadcasters certify compliance with the EEO Rule in the second and sixth years of their license term. We will conduct mid-term review of television stations with five or more full-time employees and radio stations with more than ten full-time employees, using FCC Form 397. We treat television stations differently from radio stations because of the requirements of Section 334 of the Communications Act which does not permit us to exempt television stations with five to ten full-time employees from the mid-term requirement,

154. We will also review a licensee's compliance with our EEO Rule at renewal time. NAB urges that appropriate safeguards should be instituted so as to protect broadcasters from unwarranted or frivolous petitions to deny.²²³ Under Section 309(d)(1) of the Communications Act, parties in interest have a statutory right to file petitions to deny.²²⁴ In addition, it would not be desirable, to restrict the right of parties to file petitions to deny or informal objections alleging EEO violations because, as indicated, the public has a legitimate role in the enforcement of our EEO Rule.

155. We will also monitor EEO compliance through random audits and targeted investigations resulting from information received as to possible violations. Each year we will select for audit approximately five percent of all licensees in the radio and television services, ensuring that, even though the number of radio licensees is significantly larger than television licensees, both services are represented in the audit process. Initially, the inquiry may request the contents of the station's public file. Further inquiry or inquiries may be conducted requesting additional documentation of recruitment efforts that is not in the public file. Based on the circumstances of the case, the inquiry could potentially

repon placed in its public file on February 1, 2004, the anniversary date of the filing of Kansas renewals, as well as the report placed in the public file on February 1, 2003.

²²⁰ Licensees of low power FM (LPFM) stations are subject to the Commission's prohibition against employment discrimination. See 41 C.F.R. § 73.881. However, LPFM licensees are not required to comply with any EEO program requirements. As we stated in the LPFM Repon and Order, "[b]ecause we anticipate that the vast majority of this class of licensees will employ very few (if any) full-time, paid employees, we do not intend to require LPFM licenses to comply with any EEO program requirements we adopt in our rulemaking proceeding." *Report and Order*, 15 FCC Rcd 2205, 2278 (2000).

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Recon, ¶ 48, 15 FCC Rcd at 22562

²²²

NAB Comments at 36. See also June 24, 2002 EEO *En Banc* Hearing, Tr. 41-42

²²³

47 I; S.C. § 309(d)(1),

include, but not be limited to, 1) a request for data covering any period of the license term; and 2) interviews of witnesses, including any complainant and present or former station employees.

156. Licensees will be subject to a variety of sanctions and remedies for EEO Rule violations or deficiencies. Some examples of violations or deficiencies **might** include: engaging in employment discrimination in hiring or promotions; failure to file a mid-term review when due; failure to file an EEO public ~~to~~ report when due; failure to file Form **396** when due; misrepresentation of outreach efforts or other information; non-responsiveness or evasion in responding to a **written** Commission inquiry; failure to recruit for all vacancies absent exigent circumstances; failure to widely disseminate information concerning vacancies for full-time positions; failure to analyze routinely the adequacy *of* the various program elements in achieving broad outreach to all segments of the community; failure to undertake the required Prong 3 inenu options; and failure to notify organizations that request vacancy notices. **Also**, it may constitute a violation of the EEO Rule **if**, based on all of the evidence, we determine that a licensee has attempted to evade our requirements through token or sham efforts.

157. **We** take the EEO rules and obligations we establish here very seriously, and fully expect broadcasters and MVPDs *to* do the same. We remind licensees that it is as true today as it was 20 years ago that a "documented pattern of intentional discrimination would put seriously into question a licensee's character qualification to remain a licensee." We intend to carefully monitor compliance with our EEO rules. Sanctions and remedies that may be issued by the Commission for deficiencies in licensees' EEO compliance include admonishments, reporting conditions, forfeitures, short term renewal of license, or designation for hearing for possible revocation of license or denial of renewal. The appropriate sanction or remedy will be determined on a case-by-case basis. Sanctions will be greater in cases involving recidivism, continuous EEO non-compliance, or intentional discrimination. In particular, if sufficiently egregious violations are found, we will not hesitate to designate for hearing.

158. We will also be taking steps to ensure that broadcasters, MVPDs, and the public are aware of and able to comply with the EEO rules and policies. First, we will continue to maintain an EEO page on the Commission's website." In addition, our Consumer & Governmental Affairs Bureau (CGB) will provide information to the public on the new rules adopted by the Commission. CGB will make a factsheet on the rules available to the public through our consumer centers and our website." Furthermore, Commission staff will continue to participate in conferences held throughout the country that deal with broadcast and MVPD EEO issues. Finally, as always, our EEO staff is available to answer more specific questions and provide informal guidance regarding the rules." We encourage the industry and the public to take advantage of these resources.

159. **Forms Relating to EEO Compliance.** We readopt the forms adopted in the *Report and Order*, incorporating the changes discussed above. Primarily, we eliminate the portion of the forms that provided for an election between Option A and Option B because our present Rule does not provide for

²²⁴ *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, **595** U.S. 621, 628-29 (D.C. Cir. 1978) (en banc).

²²⁵ The EEO page can be found at www.fcc.gov/mb/policy/eoo/.

²²⁶ Consumers can contact our consumer centers by calling 1-888-CALL-FCC (1-888-225-5322) (Voice) and 1-888-TELL-FCC (1-888-835-5322) (TTY). Consumer information is available on the Commission website at www.fcc.gov/cgb.

²²⁷ The EEO staff can be reached at (202) 418-1450.

an election. We also will not reissue the Initial Election Statement, which required a licensee to choose between Option A and Option B. We are addressing here only forms relating to our EEO outreach requirements. As indicated, FCC Form 395-B, the Annual Employment Report, which is being deferred, is unrelated to the implementation and enforcement of our EEO program.

160. We readopt, with modifications, FCC Form 396, which is filed by broadcasters as part of their renewal applications. As indicated, we will delete the Option A/Option B election. The form as adopted by the *Report and Order* also required the broadcaster to certify that it complied with the EEO Rule during the two-year period preceding the filing of the report; to attach a copy of its EEO public file for the preceding year; and to provide a narrative statement demonstrating how the station achieved broad outreach during the preceding two years. StBAs objects to the certification requirement because of the risk that a broadcaster would be charged with the character violation of misrepresentation arising from a genuine misunderstanding of the Rule.²²⁸ Without passing on StBAs' objection, we find the certification requirement now to be unnecessary given that we are requiring the submission of the EEO public file report from which we can make our own determination as to the licensee's compliance. In addition, the licensee must still certify to the accuracy of the forms it submits to the Commission: it just need not draw a legal conclusion as to whether the facts it submits demonstrate compliance with our rules. Accordingly, we will modify the form to eliminate the certification requirement. We will, however, require the submission of the EEO public file report due at the time of the filing of the Form 396 along with the form filed one year before that. This is because we allow two years for the performance of the Prong 3 menu options. We recognize that in some instances a station may have been sold during the prior two years. In that case, the licensee at the time of renewal need only submit EEO public file reports relating to its own operation of the station.

161. MMTC urges that we should include in the FCC Form 396 a requirement that the licensee report whether it intends to change the elements of its EEO program during the coming license term.²²⁹ We decline to adopt this proposal because licensees are free to alter the elements of their EEO programs as circumstances warrant. No purpose would be served by requiring licensees to anticipate at renewal time any possible changes that might be implemented over the ensuing eight year license term and potentially lock them into a particular program during that time. To the contrary, we expect and anticipate that licensees will continuously evaluate their compliance programs and improve upon them whenever and wherever possible.

162. The version of Form 396 adopted by the *Report and Order* included the following question: "Have any complaints been filed before any body having competent jurisdiction under federal, state, territorial or local law, alleging unlawful discrimination in the employment practices of the station(s)?" In the *Second NPRM*, we stated that the form required the reporting of "pending" discrimination complaints.²³⁰ However, we did not clarify the period of time to which the word "pending" referred, e.g., pending at any time during the most recent license term or pending at the time a renewal application is filed. StBAs urges that we should exclude from the scope of our reporting requirement complaints that have been resolved without an adverse finding against the broadcaster prior to the filing of the renewal application.²³¹ MMTC has no objection to excluding complaints that were

²²⁸ StBAs Comments at 5.

²²⁹ MMTC Comments at 137.

²³⁰ *Second NPRM*, ¶ 35, 16 FCC Rcd at 22854.

²³¹ StBAs Comments at 56.

filed and subsequently resolved on the merits in the broadcaster's favor. It notes, however, that complaints disposed of without a ruling on the merits, e.g., on procedural grounds, may remain relevant and could lead to relevant evidence of discrimination.” We agree that complaints dismissed on procedural grounds or pursuant to a settlement may remain relevant. We wish to avoid unnecessary litigation, however, as to whether a given complaint was resolved on the merits or dismissed for procedural reasons. Accordingly, we will require the reporting of all complaints filed during the most recent license term, consistent with our past practice. This will avoid unnecessary litigation and involves little additional burden. Form 396 requests information concerning the disposition or current status of the complaint, and the Commission will consider complaints only to the extent they are deemed relevant.

163. FCC Form 396-A is to be used for applications for the construction of a new broadcast station or for the sale of an existing broadcast station. We will readopt this form but delete references to the Option A/Option B election.

164. We adopted in the *Report and Order* FCC Form 397, “Broadcast Statement of Compliance,” which was to be submitted in the second, fourth, and sixth years of the license term for the purpose of certifying whether the licensee’s station employment unit complied with the EEO Rule during the preceding two years. In the *Second NPRM*, we proposed to use the Form 397 only for the purpose of filing mid-term reviews, renaming it the “Broadcast Mid-term Report.” We will adopt this proposal. Thus, Form 397 will be filed by licensees subject to mid-term review. We will modify Form 397 to eliminate the reference to an election. In addition, consistent with our discussion concerning Form 396, we will eliminate the compliance certification requirement and instead require submission of EEO public file reports for the two years preceding the filing (unless the earlier report does not pertain to the current licensee because of a sale). Two groups of television stations would be required by our new rules to file mid-term reports in 2003: New Jersey and New York filings would be due by February 1, 2003, and Delaware and Pennsylvania filings would be due by April 1, 2003. Because of the extremely short time between the anticipated effective date of the rules and the filing dates, we will not require stations in these groups to file mid-term reports in 2003.

165. Provisions for Small Stations and Small Markets. The Rule adopted by the *Report and Order* exempted from the outreach provisions (but not the nondiscrimination provisions) station employment units that had fewer than five full-time (30 hours per week or more) employees. As noted, a “station employment unit” referred to a station or group of commonly owned stations in the same market that shared at least one employee. We will include this exemption in our new Rule. We also provided in the *Report and Order* that station employment units with five to ten full-time employees would be required to perform only two, rather than four, Prong 3 menu options every two years.” We will incorporate this requirement in our new Rule. In addition, we will extend it to certain small market stations, as discussed below. We further provided in the *Report and Order* that radio station employment units with five to ten full-time employees would be exempt from the mid-term review requirement. We did not extend this relief to television stations because of the requirements of Section 334 of the Communications Act.” We will include this exemption for radio in our new Rule.

¹⁶³ MMTC Comments at 61 n. 165

¹⁶⁴ *Report and Order*, ¶ 126, 15 FCC Rcd at 2381

¹⁶⁵ *Report and Order*, 15 FCC Rcd at 2381 n. 195

166. In the *Second NPRM*, we asked whether we should expand the exemption for small stations to include employment units with ten or fewer employees. We also asked whether we should modify the requirement that stations with more than 10 full-time employees complete four menu options every two years. Smaller stations with five to 10 or fewer full-time employees are required to complete two menu options every two years. We further asked whether we should treat all stations with five or more full-time employees that are located in smaller markets like smaller stations.” Having reviewed the record, we find no basis for increasing the pertinent exemptions, except that we find some modification warranted with respect to the menu option requirements applicable to stations in smaller markets.

167. NAB supports exempting stations with fewer than ten full-time employees. It states that such stations face unique obstacles in complying with our Rule because of a lack of personnel and resources, difficulties in competing with larger stations, a lack of access to the resources to implement Prong 3 menu options, and the unavailability of the alternative provided by Option B of the former Rule. It notes that the *Report and Order* previously rejected an increase in the general exemption because small stations provide entry-level opportunities in the broadcast industry.²³⁶ NAB questions the continued viability of this assumption. NAB also contends that stations in smaller markets face difficulties similar to those facing stations with fewer than ten full-time employees, especially in complying with Prong 3 menu options.” The Association of Public Television Stations supports an exemption for stations with ten or fewer employees because of the funding problems of small public television stations, especially those outside of top 100 markets, and difficulties experienced in attracting and retaining minority employees.²³⁸ LTVG urges that we should exempt stations with fewer than 100 employees, to parallel EEOC rules.” MMTC, NOW, AWRT, NAACP, and the Lawyers’ Committee for Civil Rights Under Law oppose an increase in the exemptions, citing primarily the opportunity for entry into the industry provided by small stations.”

168. With one exception, we find no basis in the record to provide additional exemptions from our Rule beyond those referenced above. First, we reject as unsupported in the record any suggestion that the Rule we adopt today imposes unreasonable burdens on small broadcasters. As a general matter, the Rule imposes minimal burdens. In addition, small broadcasters are permitted to perform fewer menu options, and most likely will have fewer hires, resulting in fewer records to keep and fewer job vacancies requiring recruitment under the Rule. Further, as we found in the *Report and Order*, small stations provide entry-level opportunities in the broadcast industries and make up approximately 1/3 of the broadcast industry.²⁴¹ If we were to exempt such a large number of stations from the EEO Rule

²³⁵ *Second NPRM* ¶ 29, 48, 16 FCC Rcd at 22852, 22857.

²³⁶ *Report and Order*, ¶ 126, 15 FCC Rcd at 2381

²³⁷ NAB Comments at 54-58.

²³⁸ Association of Public Television Stations Comments at 8-9.

²³⁹ LTVG Comments at 33

²⁴⁰ MMTC Comments at 97-100; NOW Comments at 22-27; AWRT Comments at 17-18; NAACP Comments at 2-3; Lawyers’ Committee for Civil Rights Under Law Comments at 5.

²⁴¹ Our analysis of FCC Form 395-B forms filed in 2000 reflects that there were 4,802 stations reporting five to ten full-time employees. This represents 33.4 percent of the 14,393 stations licensed as of September 30, 2000, the deadline for the filing of the 2000 Form 395-B.

-- stations that may provide entry level opportunities for people new to broadcasting -- we would undermine the central purpose of our EEO Rule. We decline to do so.

169. We find that it would be appropriate, however, to modify our Prong 3 menu option requirement for stations in smaller markets. We recognize that smaller markets may not have the resources in the community to support some of the activities contemplated in Prong 3. We did not address this problem in the Report *and Order* because small market stations that found the menu option requirement burdensome could elect to proceed under Option B. That alternative, however, will not be available under our new Rule. We will accordingly provide that small market stations will be required to perform only two, rather than four, menu options during a two year period.

170. We will define the scope of this exemption as extending to any station employment unit consisting solely of a station or stations licensed to a community that is located in a county that is outside of all metropolitan areas, as defined by OMB, or is located in a metropolitan area that has a population of fewer than 250,000 persons. This will operate to reduce requirements for stations in most markets below the 100 largest markets using definitional criteria that are readily ascertainable from government sources.”

171. NAB requests that we reinstate a policy from our *pre-Lutheran Church* rules that did not require “the submission of information on a station’s EEO efforts to recruit minorities from those stations in markets with a minority labor force of less than five percent.”²⁴³ In the *Recon.* we denied a similar request.²⁴⁴ NAB has presented no basis for a different result now. In particular, NAB ignores the fact that the policy in question was never a wholesale exemption from the Rule because women are present in all markets. In any event, our new Rule does not require that broadcasters target minorities. There is accordingly no need to exempt them from the requirement of a prior rule that no longer is applicable.

172. In the *Recon.* we adopted a policy pursuant to which an owner who has a controlling interest (50 percent or greater voting control) in a licensee would not be considered a station employee for purposes of the EEO Rule, even if he or she worked at the station. We concluded that such an owner’s employment at the station would be more an incident of ownership rather than a normal employment relationship because the owner could not be in any normal sense hired or fired. We declined to extend this policy to lesser ownership interests because the circumstances pertaining to their employment might vary widely and we could not assume that the employment was primarily an incident of ownership.²⁴⁵ Flercher, Heald & Hildreth, P.L.C. (“FHH”), on behalf its clients, filed a petition for reconsideration, urging that owners with 20 percent or greater interests should be not be treated as “employees” for purposes of the EEO Rule. We had not acted on FHH’s petition when the Court’s

²⁴³ The most recent OMB definition of metropolitan areas is contained in OMB Bulletin No. 99-04 (June 30, 1999). See <http://www.whitehouse.gov/omb/inforeg/msa-bul99-04.html>. Metropolitan areas with a population of fewer than 250,000 are defined as Level C and D MSAs or primary MSAs (PMSAs). OMB Bulletin No. 99-04 may be used initially to define areas subject to this provision. OMB has adopted new metropolitan area standards and will announce definitions of areas based on the new standards and Census 2000 data in 2003. *Standards for Defining Metropolitan and Micropolitan Statistical Areas*, 65 Fed. Reg. 82228 (2000).

²⁴⁴ NAB Comments at 58-59.

²⁴⁴ *Recon.* ¶ 12-15, 15 FCC Rcd at 22553

²⁴⁵ *Recon.* ¶ 82, 15 FCC Rcd at 22571

decision in *Association* was issued. Accordingly, we asked for comments on FHH's proposal in the *Second NPRM*.²⁴⁶ It renews its proposal in its comments filed in response to the *Second NPRM*.

173. We will adopt FHH's suggestion. Thus, we will not consider owners holding a 20 percent or greater voting interest in a licensee as station "employees" for EEO purposes. This will be subject to the proviso, however, that no single owner has positive control (greater than 50 percent voting control) of the licensee. In that circumstance, the principal enjoying positive control would be in a position to determine whether other stockholders could be employed at the station, and only he or she could properly claim employment as an incident of ownership. Absent that circumstance, it is reasonable to believe that a 20 percent or greater owner's employment position is an incident of ownership. Someone who owns a 20 percent interest in a licensee company is not truly an employee of the licensee, holding a position that would be subject to recruitment, and thus should be permitted to work at the station without first requiring outside recruitment. FHH suggests that we should, as a safeguard, require that the owners have made a capital contribution. We do not find this necessary. Legitimate ownership interests may exist that do not involve a capital contribution. In the event of alleged abuse of this exception, we will consider all relevant factors, including the extent of an asserted owner's capital contribution to determine the legitimacy of a claimed ownership interest.

174. LTVG suggests that broadcasters should be permitted to hire owners with two percent or greater equity or their immediate family without recruitment. The justification cited is to allow the hiring of family members in a family-owned business.²⁴⁷ In the case of interests of less than 20 percent, however, it cannot be assumed that a position at the station is an incident of ownership. We further find no basis for providing an exemption from the recruitment requirement based on a family relationship with an owner because it could disadvantage possibly better qualified outside applicants. Accordingly, we decline to adopt this proposal.

3. MVPD EEO Program Requirements

a. Rules and Policies

175. We will adopt substantially the same outreach program, recordkeeping and reporting requirements for MVPDs, as we have for broadcasters. The only distinctions will arise in light of the specific requirements imposed by Section 634 of the Communications Act. Thus, we monitor the EEO programs pursuant to annual reports which have contained employment and program data, as required by statute. We will be creating a new form, described below, that will contain only program data. As mentioned above, we are deferring consideration of a new form for MVPDs that requires employment data. Because our review of MVPD EEO compliance is an annual review pursuant to Section 634, we define the Prong 3 menu options requirement for MVPDs in terms of performing two initiatives annually for those with more than ten full-time employees or one initiative annually for those with six to ten full-time employees. NCTA generally supported our proposed rules in its Comments.

176. With respect to the definition of "community" for the purpose of determining broad outreach, NCTA argues that cable operators should be able to define their "community" as encompassing only the areas they are franchised to serve.²⁴⁸ As noted in paragraph 92 above, we are not adopting the

²⁴⁶ *Second NPRM*, ¶ 1, 16 FCC Rcd at 22843.

²⁴⁷ LTVG Comments at 32-33.

²⁴⁸ NCTA Comments at 3-4.

proposal in the *Second Notice* to use MSAs as a means of defining “community” for the purpose of determining broad outreach. Rather, we are leaving the definition of “community” for this purpose to the reasonable good faith discretion of the entity concerned. We will apply the same policy to MVPDs. MVPDs should use pertinent criteria discussed in paragraph 92, *supra*, including the location of the system, pertinent market definitions adopted by public agencies or commercial services, and requests for notices of job vacancies from locally-based community groups. They should also consider what areas actually produce job applicants. MVPDs should engage in broad outreach throughout the entire local community from which they can reasonably expect to elicit applicants, whether or not that community is defined by its franchise area.

177. American Cable Association (“ACA”), a trade association of small system and small market cable operators, urges us to provide an exemption from the outreach requirements and streamlined recordkeeping and reporting requirements to cable systems with fewer than 15,000 subscribers or, in the alternative, with ten or fewer employees.” ACA premises its request on the fact that the Commission previously provided relief to systems with fewer than 15,000 subscribers in the context of rate regulation.”” The EEO requirements we are adopting, however, are not comparable to rate regulation and we do not believe that cable systems employing six or more full-time employees will experience hardship in complying with the outreach requirements. Moreover, ACA estimates that the requested relief might extend to systems employing 14,000 of what ACA estimates to be a total of 131,000 employees in the cable industry.²⁵¹ If correct, more than 10 percent of the industry would be exempt under ACA’s proposal. We accordingly decline to adopt any additional provisions relating to small systems beyond those already proposed in the *Second NPRM*, except that we will, as in the case of broadcasters, adopt a provision requiring the performance of fewer Prong 3 menu options by systems in smaller markets. Thus, smaller market cable operators, as well as other MVPDs, will be required to perform only one menu option per year. We will use the same definition of a small market that we are using for broadcast stations.

178. MVPD compliance with the EEO requirements is monitored pursuant to annual reports filed by MVPDs, FCC Form 395-A (for cable operators) and FCC Form 395-M (for other MVPDs). The only substantive modification required by the new rules adopted today is the elimination of the Option A/Option B election. In addition, we will combine these forms. The two forms are virtually identical except for a section in the Form 395-A requiring cable operators to list the communities in which they operate. In view of the similarity of the two forms, we do not find any necessity for having separate forms for cable operators and other MVPDs. Both forms request information concerning the entity’s EEO outreach program. In addition, both forms request information as to the gender and racial/ethnic composition of the entity’s workforce, analogous to the broadcast Form 395-B. As in the broadcast context, the data concerning the entity’s workforce is no longer pertinent to the administration of our EEO outreach requirements. We will accordingly adopt at this time a single form, FCC Form 396-C, which will include the portions of Forms 395-A and 395-M relating to EEO outreach, but not the portion eliciting data concerning the entity’s workforce, for use by all MVPDs. We will consider the adoption of a new form for eliciting workforce data from MVPDs as part of the future Report and Order in which we will also address the broadcast Form 395-B.

²⁴⁹ ACA Comments at 2.

²⁵⁰ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 10 FCC Rcd 7393 (1995).

²⁵¹ ACA Comments at 7.

C. Constitutional Issues

179. StBAs argues that requiring broadcasters to disclose publicly the racial and gender composition of their employees on FCC Form 395-8 would create constitutional problems because the Commission will use the data in EEO enforcement decisions and private groups will use the data to pressure broadcasters to adopt race or gender-based hiring policies by pursuing actions against them before the Commission.²⁵² According to StBAs, it was this kind of pressure, whether applied by government regulators or by third parties, that the court found unconstitutional in *Lutheran Church*.

180. As discussed earlier, the Commission is deferring consideration of Form 395-B at this time. The court in *Association* upheld Option A of the EEO Rule as constitutional because it found that broadcasters were not pressured to recruit minorities and women under Option A. The recruitment outreach provisions we are adopting in this *Second Report and Order and Third Notice of Proposed Rule Making* are the same in all material respects as the basic requirements of Option A. In enforcing the EEO Rule, the Commission will not pressure employers to favor anyone on the basis of race, ethnicity, or gender. Therefore, as a race and gender neutral regulation, the EEO Rule we are adopting today raises no equal protection concerns.

181. LTVG alleges that broadcasters should not be required to post their EEO public file reports on their websites because this requirement is "probably unconstitutional under the First Amendment." Radio Licensees allege that the Prong 2 and Prong 3 requirements are unconstitutional and beyond the FCC's statutory authority.²⁵³ Neither party provides any basis for their assertions, however, and we are unable to find any.²⁵⁴

V. THIRD NOTICE OF PROPOSED RULE MAKING

182. The EEO rules apply to all "full-time employees," defined as those whose regular work schedule is 30 hours or more a week. We have previously applied a "substantial compliance" policy to positions involving less than 30 hours a week, although we did not require reporting of this effort and did not focus on part-time hires in our review of EEO programs. As discussed above, we do not have sufficient evidence in the current record to make an informed decision about whether and how to apply the new EEO rules and policies to part-time positions, defined as less than 30 hours per week.²⁵⁵ We are thus seeking comment on this issue. In particular, we seek comment on how many and what types of positions in the broadcast and MVPD industries fall into this category, what is the significance of these positions in terms of entry into broadcasting, how burdensome compliance with the recruitment, record-keeping, and reporting requirements for all or some part-time positions would be for broadcasters and MVPDs, and whether the requirements applicable to part-time positions should be the same as or different from those applicable to full-time positions. We also seek comment on whether we should set a

²⁵² StBAs Reply Comments at 9-12

²⁵³ LTVG Comments at 34; Radio Licensees Comments at 6

²⁵⁴ We note that we have concluded in the past that disclosure requirements promote First Amendment interests by increasing the flow of information to the public. *See, e.g., Policies and Rules Concerning Children's Television Programming*, 11 F.C.C. Rcd 10660, 10684 (1996). *See also Meese v. Keene*, 481 U.S. 465 (1987) (upholding film labeling requirements under First Amendment).

²⁵⁵ *See* ¶ 104, *supra*

minimum number of hours for a part-time position to be covered by the rules and, if so, what that minimum should be.

VI. CONCLUSION

183. In this *Second Report and Order and Third Notice of Proposed Rule Making*, we adopt a new broadcast EEO Rule and set of policies, and we amend our MVPD EEO rules and policies. We remain committed both to prohibiting discrimination in employment and requiring broad and inclusive outreach in recruitment by broadcasters and cable entities.

VII. PROCEDURAL MATTERS AND ORDERING CLAUSES

184. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Second NPRM*. The Commission sought written public comments on the possible significant economic impact of the proposed policies and rules on small entities in the *NPRM*, including comments on the IRFA. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, a Final Regulatory Flexibility Analysis ("FRFA") is contained in Appendix B.

185. *Paperwork Reduction Act of 1995 Analysis.* The actions herein have been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to, and become effective upon, approval by the Office of Management and Budget as prescribed by the Act.

186. *Ex Parte Rules.* With respect to the *Third Notice of Proposed Rule Making (Third NPRM)*, this is a permit-but-disclose notice and comment proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. See generally 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

187. *Initial Regulatory Flexibility Analysis.* With respect to the *Third NPRM*, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in the Appendix hereto. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the possible significant economic impact on small entities of the proposals contained in this *Third NPRM*.²⁵⁶ Written public comments are requested on the IRFA. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the *Third NPRM*, but they must have a distinct heading designating them as responses to the IRFA.

188. *Comments and Reply Comments.* Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before December 20, 2002, and reply comments on or before January 6, 2003. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

189. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however,

²⁵⁶

See 5 U.S.C. § 603

filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW-A325, Washington, D.C. 20554.

190. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Wanda Hardy, 445 Twelfth Street, S.W., Room, 2-C221, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Word 97 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number in this case, MM Docket No. 98-204), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals 11, 445 12th Street, S.W., Room CY-B402, Washington, DC 20554.

191. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 Twelfth Street, S.W., CY-4257, Washington, D.C. 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0270, (202) 418-2555 TTY, or bcline@fcc.gov.

192. This document is available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Brian Millin at (202) 418-7426, TTY (202) 418-7365, or bmillin@fcc.gov.

193. *Initial Paperwork Reduction Act of 1995 Analysis.* This *Third NPRM* contains either a proposed or modified information collection in that part-time hires could potentially be subject to Information collection requirements. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Second NPRM*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Third NPRM*: OMB comments are due 60 days from the date of publication of this *Third NPRM* in the Federal Register. Comments should address: (a) whether the potential collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 Twelfth Street, S.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov and to Edward Springer.

OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503, or via the Internet to Edward.Springer@omb.eop.gov.

194. *Authority.* This *Third NPRM* is issued pursuant to authority contained in Sections 1. 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554.

195. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1. 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554, this *Second Report and Order and Third Notice of Proposed Rule Making* IS ADOPTED, and Part 73 and Part 16 of the Commission's Rules ARE AMENDED as set forth in attached Appendix C. It is our intention in adopting these rule changes that, if any provision of the rules, or the application thereof to any person or circumstance, is held to be unlawful, the remaining portions of the rules not deemed unlawful and the application of such rules to other persons or circumstances shall remain in effect to the fullest extent permitted by law.

196. IT IS FURTHER ORDERED that the late-filed comments and reply comments in this proceeding are considered as part of the record in this proceeding.

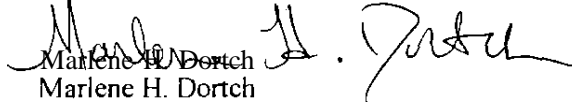
197. IT IS FURTHER ORDERED that, pursuant to the Congressional Review Act, the new rules and amendments set forth in Appendix C WILL BECOME EFFECTIVE either 60 days after their publication in the Federal Register or upon receipt by Congress of a report in compliance with the Congressional Review Act, 5 U.S.C. § 801, whichever is later, and the information collection contained in these rules will become effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise. We will not require television broadcast licensees to file EEO mid-term reports in 2003.

198. Upon the effective date of the rules adopted herein, our action suspending certain of our former rules in *Suspension of the Broadcast and Cable Equal Employment Opportunity Outreach Program Requirements*, 16 FCC Rcd 2872 (2001) (*Suspension Order*) WILL BE VACATED, except that Sections 73.3612 of the Commission's Rules, 41 C.F.R. § 73.3612 (Annual Employment Report) and 76.1802 of the Commission's Rules, 47 C.F.R. § 76.1801 (Equal Employment Opportunity) will remain suspended in accordance with the terms of the *Suspension Order* pending further action on workforce data collection issues, as discussed above.

199. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Second Report and Order and Third Notice of Proposed Rule Making*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

200. IT IS FURTHER ORDERED that MM Docket No. **98-204** will remain open for the limited **purpose** of considering the issues raised in the **Third Notice of Proposed Rule Making**, as discussed above, and to facilitate any additional proceedings upon further order of the Commission

FEDERAL COMMUNICATIONS COMMISSION


Marlene H. Dortch
Marlene H. Dortch
Secretary

